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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Section 4(b) of the Administrative Procedure Act requires an agency to provide "a concise general statement of . . . basis and purpose" for rules it adopts. In this case the court upheld the agency's statutory authority to adopt the rule under review and acknowledged its understanding of the agency's stated reasons for adopting the rule. The question presented is whether section 4(b) nevertheless enables the court to vacate the rule solely because the agency did not also explain (i) how its stated reasons were consistent with the statute being administered, or (ii) why it did not decide to implement the statute differently.

* * * *

If certiorari is granted on the foregoing question, petitioner requests the right to argue the following question, but does not include this question among the reasons for granting the writ:

Whether the Secretary of Transportation provided an adequate statement of basis and purpose for her rule allowing oil tankers built with the aid of government subsidies to shed their domestic trading restrictions by repaying the subsidies in accordance with a formula previously approved by this Court.

LIST OF PARTIES

The following parties appeared in the proceedings below:

Defendant-Appellees

Atlantic Richfield Company (Petitioner herein)
United States of America
Elizabeth Hanford Dole, Secretary of Transportation
Moore McCormack Bulk Transport, Inc.*
Yeon Shipping Corporation *
American Petrofina, Inc.

Plaintiff-Appellants

Independent U.S. Tanker Owners Committee
Overseas Shipholding Group, Inc.
First Attransco Tanker Corp.
Second Attransco Tanker Corp.
Third Attransco Tanker Corp.
American Trading Transportation Company, Inc.
Alaska Bulk Carriers, Inc.
Cove Maritime Companies, Inc.
Crest Tankers, Inc.
Falcon Carriers, Inc.
Sun Transport, Inc.
Trinidad Corp.
Victory Carriers, Inc.
Seatrain Lines, Inc.

Petitioner believes that the parties designated by an asterisk (*) do not have an interest in the outcome of the proceedings in this Court. All other parties to the proceedings below remain parties to the proceedings in this Court.

RULE 28.1 LISTING

Petitioner Atlantic Richfield Company is a publicly-held corporation. A list of its subsidiaries and affiliates that are not wholly owned is set forth in the Appendix, at p. 44a.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Atlantic Richfield Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in *Independent U.S. Tanker Owners Committee v. Dole* on January 16, 1987.

OPINIONS BELOW

The opinion and order of the court of appeals is reported at 809 F.2d 847 and is reprinted in the Appendix, at p. 2a. The memorandum decision and order of the United States District Court for the District of Columbia (Jackson, D.J.) is reported at 620 F. Supp. 1289 and is reprinted in the Appendix, at p. 16a.

JURISDICTION

The court of appeals entered its judgment on January 16, 1987. It denied timely petitions for rehearing on March 24, 1987. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(c) (1982), provides in relevant part:

> After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

STATEMENT OF THE CASE

This case involves judicial review of informal rulemaking by the Secretary of Transportation. The district court's jurisdiction was based on 28 U.S.C. §§ 1331, 1333, 1337, 1651 and 2201-02 (1982).

Background. Section 506 of the Merchant Marine Act, 1936 requires the owner of a merchant vessel built with construction-differential subsidy (CDS) to agree not to operate the vessel in the domestic trade except pursuant to temporary permissions granted by the Secretary of Transportation. In *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980), the Court held that the Secretary has statutory authority to agree to the permanent removal of this domestic-trading restriction upon full repayment of the unamortized portion of the CDS plus interest. The Court observed that such repayment, reflecting the additional capital costs that would have been incurred had no subsidy been available, places the once-subsidized vessel on an equal footing with those already operating in the domestic trade. 444 U.S. at 589-90. The decision below represents the court of appeals' second rejection, on procedural grounds, of regulations implementing the authority confirmed in *Seatrain*.

The first case involved a rule that prescribed certain conditions that an applicant for repayment had to satisfy before it could apply for repayment and listed factors the agency would consider in passing upon the application. After concluding that the rule was within the agency's discretion from a substantive standpoint, the court of appeals vacated the rule for failure to provide the concise general statement of basis and purpose required by section 4(b) of the APA.

Reasoning that an agency's statement of basis and purpose should enable the reviewing court "to see what major issues of policy were ventilated by the informal proceeding and why the agency reacted to them as it did," the court faulted the agency for merely stating that it had considered the comments received in the rulemaking proceedings rather than discussing or responding to them. *Independent U.S. Tankers Committee v. Lewis*, 690 F.2d 908, 918-19 (D.C. Cir. 1982). The court remanded with instruction for new rulemaking proceedings, but ruled that the single large tanker that had been allowed permanent entry into the domestic trade pursuant to the rule would "do no harm" in the interim given the shortage of tankers in the trade. *Id.* at 931.

The Case Below. The present case involves the rule adopted following that remand. Unlike the earlier rule, the new rule did not establish substantive criteria for evaluating repayment applications on a case-by-case basis. Rather, the agency, after evaluating the domestic tanker industry, designated a one-year period during which any of the existing 29 subsidized tankers could permanently enter the domestic trade by making full repayment of the unamortized portion of its CDS plus interest.

In adopting the rule, the agency explained (1) that in its view the statutory objectives of maintaining an adequate domestic merchant fleet would be assured only if the fleet were encouraged to be efficient and competitive;

(2) that restrictions against market entry by the larger and relatively efficient subsidized tankers had resulted in artificially high domestic shipping rates; (3) that allowing market forces rather than periodic exercises of government discretion to decide which of the subsidized tankers would enter the domestic trade would increase the competitiveness of the fleet and reduce transportation costs; and (4) that the Court, in *Seatrain*, had confirmed that permanent domestic operation upon full CDS repayment was not only consistent with the purposes of the Merchant Marine Act but was preferable to *de facto* government regulation of domestic capacity through periodic discretionary permissions. 48 Fed. Reg. 4409-10 (App. 37a-42a); 50 Fed. Reg. 19,172-78 (App. 33a-35a).

The rule became effective June 6, 1985. On October 25, 1985, the district court upheld the rule, concluding that the "record . . . speaks to all the [plaintiffs'] concerns," and that "the Secretary's reasoning is clear, whether or not it will prove to have been correct, and . . . the payback rule rationally follows from that reasoning." App. 26a & 31a.

During the rule's one-year payback period, ending June 6, 1986, only three subsidized tankers repaid their subsidies and entered the domestic trade. Two of those tankers are owned by petitioner, which paid the government $86.5 million in exchange for permanent removal of the domestic trading restrictions.

By its January 1987 opinion the court of appeals upheld the agency's statutory authority to adopt a rule allowing any subsidized tanker to enter the domestic trade upon full CDS repayment, but again concluded that the agency's statement of basis and purpose for the rule was inadequate. Although the court acknowledged its understanding of the agency's reasons for adopting the rule,[1]

[1] In parts I and II of its opinion, the court, in upholding the agency's statutory authority to issue the rule, noted that the rule

it held that the rulemaking was procedurally deficient because the agency failed to explain how encouraging efficiency and competition free of unnecessary regulation was consistent with or implicit in the statutory objective of promoting the domestic merchant fleet. App. 14a.

The court required this explanation despite its own previous recognition that (i) the statute had been enacted in part to promote an "efficient merchant fleet";[2] (ii) the agency was obligated "to minimize interference with the free market forces normally at work in the domestic trade";[3] and (iii) this Court held in *Seatrain* that full CDS repayment with interest eliminates the sole reason for regulation of subsidized shipping capacity in the domestic trade.

Because it found that the lack of such explanation was "quite serious and rais[ed] considerable doubt about which of the proposed [sic] alternatives [to the rule] would best serve" the statutory objectives, the court elected not to remand for a fuller explanation, but to vacate the rule entirely. App. 15a. It withheld issuance of its mandate for six months, however, "to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade." *Id.*

Subsequent Events. On April 15, 1987, the Maritime Administration published a new Notice of Proposed Rulemaking. 52 Fed. Reg. 12,199. The proposed rule, if adopted and upheld in the inevitable court challenge,

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was designed to address the problems of overcapacity in the foreign trade and the shortage of larger tankers in the Alaska trade. App. 4a-5a. It also noted that the rule provided a better solution to these problems than did the agency's previous remedy of granting discretionary permissions for temporary domestic operation of subsidized tankers. App. 7a-8a.

[2] *American Trading Transp. Co. v. United States*, 791 F.2d 942, 944 (D.C. Cir. 1986).

[3] *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 U.S. 908, 917 (D.C. Cir. 1982).

would allow the four tankers that repaid their subsidies under the two vacated rules to remain eligible for domestic operaion. On March 25, 1987, however, the House Committee on Appropriations reported a supplemental appropriations bill which would prohibit the agency from using appropriated funds to adopt the newly proposed rule or to participate in any judicial proceedings involving the issue of CDS repayment.[4]

REASONS FOR GRANTING THE WRIT

The court of appeals' decision is based upon a view of administrative law that is fundamentally at odds with the precepts prescribed by Congress and this Court. Here this incorrect view enabled the court to frustrate the agency's decade-long effort to implement a major element of maritime policy. If uncorrected, it will enable reviewing courts generally to reverse other policy decisions that fully comply with governing statutes.

Unquestionably the court below understood the reasons given by the agency in adopting the rule under review. It refused to decide whether those reasons constituted an irrational policy choice that was inconsistent with the governing statute (as those challenging the rule had argued). Instead, the court vacated the rule because the agency had not itself explained, to the court's satisfaction, why the agency believed its reasons to be consistent with the statute. Such an expansive view of the procedural requirement for a statement of a rule's basis and purpose enables reviewing courts to avoid their responsibility to decide the substantive issues presented. This will inevitably allow courts to substitute their judgment for that of the agency by simply finding inadequate the agency's description of its legal analysis, as distinct from the legal analysis itself.

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[4] H.R. 1827, sec. 506, described in H.R. Rep. No. 28, 100th Cong., 1st Sess. 120 (1987).

The importance of correcting this erroneous approach by the court which adjudicates the vast majority of challenges to agency action is self evident. As a practical matter, agencies must tailor their procedures to the standards set by the Court of Appeals for the District of Columbia Circuit. If that court is allowed to continue to fashion its own procedural requirements, this Court's opinions pointing to a different path will soon be seen as little more than academic curiosities that are irrelevant to administrative law as actually practiced.[5]

I. The Court of Appeals' "Statement of Basis and Purpose."

Despite this Court's guidance to the contrary, the court below continues to expand its common law of administrative procedure.[6] Having been instructed in *Vermont Yankee*, 435 U.S. 519, not to impose extra-statutory procedural requirements, the court now turns to expansive statutory construction to achieve the same result. It here finds in the APA's "concise general statement of . . . basis and purpose" a requirement not only that the agency explain the reasons it adopted the rule, but also that it must explain the statutory derivation of those reasons. The court further requires that the agency explain why the rule was not rejected in favor of other rules that might have been proposed. Rules unaccompanied by such explanations are vacated.[7]

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[5] Witness a prominent commentator's characterization of the decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), as "largely one of those rare opinions in which a unanimous Supreme Court speaks with little or no authority." 1 K. Davis, *Administrative Law Treatise* 616 (2d Ed. 1978).

[6] *See generally* Scalia, *Vermont Yankee: the APA, the D.C. Circuit and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 348-56 & 378-80 (1979).

[7] The court of appeals' development of its expansive "statement of basis and purpose" parallels its development of the "hybrid" rulemaking procedures addressed in *Vermont Yankee*. *E.g.*, *Auto-*

The court's perfunctory reference to the APA changes neither the nature nor the consequences of its actions. It remains "the sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding [that] can do nothing but seriously interfere with that process prescribed by Congress." *Vermont Yankee*, 435 U.S. at 548. Unlike the "explanation" required by this Court, the court of appeals' required statement is considerably more than a tool to aid the court in conducting its substantive review of the agency's action. It is a separate procedural element with a life of its own. The statement is examined in its own right. If it is found wanting, the court will vacate the agency action for procedural deficiency without regard to its substantive merit.[8]

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motive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968); *Amoco Oil Co. v. EPA*, 501 F.2d 722 (D.C. Cir. 1974); *Nat'l Welfare Rights Org'n v. Mathews*, 553 F.2d 637 (D.C. Cir. 1976); *Nat'l Wildlife Fed'n v. Costle*, 629 F.2d 118 (D.C. Cir. 1980); *Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788 (D.C. Cir. 1984).

Though other courts of appeals tend to cite early D.C. Circuit cases in this area, none has adopted that court's current view of the "statement of basis of purpose." Several have specifically disavowed such a broad concept. *E.g., Baltimore & Ohio Chicago Terminal R.R. v. United States*, 583 F.2d 678, 688 (3d Cir. 1978); *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 886 (4th Cir. 1983); *United States v. Garner*, 767 F.2d 104, 118 (5th Cir. 1985); *Alabama Ass'n of Ins. Adjustors v. Board of Governors*, 533 F.2d 224, 236-37 (5th Cir. 1976); *Sierra Club v. Clark*, 755 F.2d 608, 619 (8th Cir. 1985).

[8] In parts I and II of its opinion, the court disclosed a full understanding of both the basis and purpose of the rule under review. See note 1, *supra*. Though parts of the court's opinion appear to address substantive considerations, in the end the court makes clear that its invalidation of the rule is based solely on procedural grounds. App. 15a. *Cf. Vermont Yankee*, 435 U.S. at 539-42.

II. This Court's Approach Is Designed to Define the Bounds of Judicial Review and Enhance Respect for Administrative Discretion.

The Court's decisions make clear that an agency must "cogently explain" its action. *E.g., Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (hereinafter cited as *State Farm*); see note 15, *infra*. This requirement is a product of the "simple but fundamental rule of administrative law" that a court in reviewing an agency's action must rely on the agency's rationale. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). This explanation is not a separate procedural requirement. It is that part of the administrative record reflecting the agency's rationale. Availability of that rationale enables the court to maintain the integrity of the administrative process, *Atchison, Topeka and Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 807 (1973); *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943), "by making workable the system of restrictive judicial review in relation to the wide discretionary authority which Congress has given the [agencies]." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 196 (1941). At bottom, it is founded on the requirement, enunciated in *Opp Cotton Mills v. Administrator of Wage and Hour Division*, 312 U.S. 126, 144 (1941), that to avoid an unconstitutional delegation of legislative authority, an agency's "record of its action [must be] such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed."

The Court's opinions teach that disposition of cases on procedural grounds is disfavored.[9] Unless an agency's failure to comply with a statutory procedure materially affects the rights of a party, the reviewing court is ex-

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[9] *Cf. Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966); *Foman v. Davis*, 371 U.S. 178 (1962) (referring to dispositions based on technical infractions of civil rules).

pected to rule on the substance of the action by applying the appropriate standard of review to the administrative record.[10] The explanation contained in that record is inadequate only if "the reviewing court simply cannot evaluate the [substantive merit of the] challenged agency action on the basis of the record before it." [11]

III. The Court of Appeals' Approach Obscures the Bounds of Judicial Review and Fails to Respect Administrative Discretion.

Notwithstanding this Court's emphasis on substantive review, the court below again demonstrates its predilection for disposing of cases on procedural grounds. The danger in this approach is particularly significant where, as here, the substantive challenge is based primarily on the "wisdom" of the agency's decision. Since the Court has specifically instructed reviewing courts not to "inquire into the wisdom of the" agency action, *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972), a court must uphold the action even if it deems the action unwise.

This principle will have little practical effect if reviewing courts are permitted to vacate actions for failure to provide fuller explanations underlying the articulated agency rationale.[12] Because the determination of the "ad-

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[10] This, in effect, is a reiteration of the harmless error rule embodied in the APA, 5 U.S.C. § 706.

[11] *Florida Power & Light Corp. v. Lorian*, 470 U.S. 729, 744 (1985). The Court reiterated its aversion to procedural rejection in *Vermont Yankee*, 435 U.S. at 549 & 558. The court of appeals' reluctance to accept this guidance indicates that it agrees, at least in principle, with Professor Davis's view that *Vermont Yankee* was overruled by *State Farm, supra*, p. 9. *See* Panel Discussion, *Present at the Creation: Regulatory Reform Before 1946* (featuring K. Davis & W. Gellhorn), 38 Admin. L. Rev. 507, 527 (1986).

[12] The court of appeals has stated: "[O]ur review of [an agency's] procedural integrity in promulgating the regulations before

equacy" of a statement of basis and purpose allows a subjective inquiry, rejection of a rule on this basis avoids rigorous analysis and critique.[13]

The court of appeals' expansive view of the requirement for a statement of basis and purpose distorts the administrative process. At best, it is a vexatious, extra-statutory procedural burden. At worst, it is a handy veil behind which a court may substitute its judgment for the agency's in a manner which eludes detection.

IV. The Requirement Has No Statutory Basis and Is Contrary to This Court's Guidance.

The notion that the court below is implementing an APA procedural requirement will not withstand scrutiny. The statutory language, its legislative history and its contemporaneous interpretation by the Attorney General belie any intent by Congress to burden informal rulemaking with the extensive procedural requirements here imposed.

The Attorney General's Manual on the Administrative Procedure Act discusses the statement of basis and purpose as follows:

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us is the product of our independent judgment, and our main reliance in ensuring that, despite its broad discretion, the Agency has not acted unfairly or in disregard of the statutorily prescribed procedures." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (decided five months after *Vermont Yankee*).

[13] Because the agency can never be sure what the court will want included in the "statement of basis and purpose" for a given rule, the tendency will naturally be to throw everything in. *Cf. Vermont Yankee*, 435 U.S. at 547-48. This serves to increase the bulk of the Federal Register, but still does not assure judicial approval. The final rule here occupied less than seven column-inches in the Federal Register. 50 Fed. Reg. 19,178. The "concise general statement" accompanying it exceeded 200 column-inches, 50 Fed. Reg. 19,170-78, and incorporated by reference another 34 pages of the Federal Register (the NPRM, 48 Fed. Reg. 4408-42), a 68-page Reg-

> The required statement will be important in that the courts and the public may be expected to use such statements in the interpretation of the agency's rules. The statement is to be "concise" and "general". Except as required by statutes providing for "formal" rule making procedure, findings of fact and conclusions of law are not necessary. Nor is there required an elaborate analysis of the rules or of the considerations upon which the rules were issued. Rather the statement is intended to advise the public of the general basis and purpose of the rules.[14]

In the APA, Congress carefully circumscribed the courts' ability to overturn agency actions. Here the court seeks to circumvent that restrictive statutory design by redefining a narrow procedural element. The court cautions against an "overly literal" reading of the terms "concise" and "general," App. 9a. Not even the most liberal of readings, however, would justify the conclusion that the Congress intended to impose the procedural requirements the court below seeks to include under the rubric of the statement of basis and purpose. Indeed, even replacing the words "concise general" with "elaborate detailed" would not justify requiring a brief on the legal issues underlying the stated basis or an exhaustive report on possible alternatives to the agency's chosen course.

Although the court of appeals' "statement of basis and purpose" bears a superficial resemblance to this Court's requirement that an agency "cogently explain" its action,[15] the two concepts are fundamentally different in

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ulatory Impact Analysis, and a 66-page Environmental Assessment. It seems more likely that it would have been faulted for not being concise, than for being inadequate.

[14] *Attorney General's Manual on the Administrative Procedure Act* 32 (1947). This Manual is "entitled to some deference . . . because of the role played by the Department of Justice in drafting the legislation." *Vermont Yankee*, 435 U.S. at 546.

[15] *State Farm*, *supra*, p. 9, 463 U.S. at 48. "[T]he agency must examine the relevant data and articulate a satisfactory explanation

their application and effect. All that is required under this Court's approach is a "contemporaneous explanation" which indicates "the determinative reason for the final action taken." *Camp v. Pitts*, 411 U.S. 138, 143 (1971). That explanation is adequate if it discloses "the factors that were considered" and the agency's "construction of the evidence." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (hereinafter cited as *Overton Park*). There is no basis in this Court's decisions for a requirement that the agency explain how it derived the factors it considered from the governing statute or why those factors did not lead to a different course of action.

A. Statutory Derivation.

The court below correctly observed that the agency's rule was based on its view that the Merchant Marine Act's "broader policy mandates" encompass the "promotion of a more competitive and efficient merchant fleet." App. 13a. Although the court itself had previously used similar terminology in describing the Act's objectives,[13]

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for its action including a 'rational connection between the facts found and the choice made.' Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)." *Id.* at 43. The Court had previously held, in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756 (1973), that the *Burlington Truck Lines* requirements did not apply to informal rulemaking, and in applying it in *State Farm* thought it "relevant that Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court . . . and intended that agency findings . . . would be supported by 'substantial evidence on the record considered as a whole.'" 463 U.S. at 43-44 (citations omitted). *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 538 (1981), is similar in this regard. Thus, it is not clear that the Court would apply even these less burdensome standards to the agency action at issue here—informal rulemaking with APA record-making requirements only. *But cf. Bowen v. American Hosp. Ass'n*, 476 U.S. ——, 106 S.Ct. 2101 (1986).

[13] See cases cited at p. 5, *supra*. Note, too, that in *Seatrain*, 444 U.S. at 584, the Court described the Act's purpose as being to develop and maintain "a large and effective merchant marine" consisting of a "modern and efficient" fleet.

it refused to decide whether the agency's interpretation of the statute was reasonable and vacated the rule because of the agency's failure to explain why it felt its construction was reasonable.[17]

The Court has instructed courts reviewing an agency's construction of the statute it administers to use a deferential standard and attitude. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court has also explained that an agency's failure to provide reasons for its statutory construction may affect the degree of deference a court gives that construction. *E.g., Adamo Wrecking Co. v. United States*, 434 U.S. 275, at 287-88, n.5 (1978). But it has never suggested that a reviewing court may avoid its independent duty to construe the statute by requiring the agency to provide further support for its construction.[18]

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[17] Since the interpretation at issue was not a product of this rulemaking, there was no reason for the agency to explain it in the record of this rulemaking. It did indicate in the NPRM, 48 Fed. Reg. at 4411-12, that this interpretation was routinely used in administering the Act. Undoubtedly its view was influenced by the judicial views referred to in note 16, *supra*. At most this expression of its view was a "general statement of policy" that is exempt from the requirements of 5 U.S.C. § 553(b) & (c). The common practice where the court desires a more thorough analysis of a question of law not addressed in the administrative action under review is to direct the parties to submit briefs on the subject. *E.g., United States v. Florida E. Coast Ry.*, 410 U.S. 224, 226-27 (1973). In *United States v. City of Fulton*, 475 U.S. ——, ——, 106 S.Ct. 1422, 1426 (1986), the Court conducted "its own examination of the historical record" seeking an explanation for a relevant, though pre-rulemaking, statutory interpretation.

[18] *Cf. Railway Labor Executives Ass'n v. United States R.R. Retirement Bd.*, 749 F.2d 856 (D.C. Cir. 1984) (*Chevron* deference principles cited as basis for vacating agency action without substantive review where agency fails to articulate interpretation of statute). Though the court did not cite *Railway Labor Executives* or *Chevron* in this case, its reasoning was similar to that used in the former case.

After noting that the agency failed to discuss how it derived its policies from the statute, the court below continued: "We take no position on whether these policies can be squared with the Act. But in the absence of any such discussion, this court can only conclude that [the] action is 'arbitrary, capricious, . . . or not otherwise [sic] in accordance with law.' 5 U.S.C. § 706(2)(A) (1982)." [19] The contrast with this Court's directions could hardly be sharper: "So long as the policies can be discerned, the court may exercise *its proper function* of determining whether the agency's policies are consistent with congressional directives." [20]

B. Alternatives.

According to the court below, the statement of basis and purpose for the action taken must include an explanation why different actions were not taken.[21] There

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[19] App. 14a. Ironically, the lower court cites *Overton Park*, 401 U.S. 402, 412-13, 416, in support of its action. *But cf. id.*, at 416: "The reviewing court must consider whether the Secretary properly construed his [statutory] authority." The APA itself directs that "the reviewing court shall decide all relevant questions of law [and] interpret . . . statutory provisions." 5 U.S.C. § 706 (1982).

[20] *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 809 (1973) (emphasis added). *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981), is not *contra*. There the Court held that the objective sought by the agency was not authorized by the statute and that therefore the agency had acted beyond statutory authority in promulating the rule. In this case, the court below ruled that the Secretary's rule "was well within her statutory authority." App. 4a. In other words, *American Textile* addressed the issue of "improper purpose" whereas the court below was concerned with an "irrelevant consideration." This distinction is more clearly developed in English law. *See generally*, Taylor, *Judicial Review of Improper Purposes and Irrelevant Considerations*, 35 Cambridge L.J. 272 (1976).

[21] App. 13a & 15a. The court below fails to note that the proposed rule itself resulted from the agency's consideration of the comments and alternatives offered during the previous rulemaking and other

is nothing in the APA or the decisions of this Court to support such a requirement. In *State Farm*, the Court was careful to explain that it was not sanctioning a broad requirement that agencies consider alternatives. 463 U.S. at 50-51. The Court held only that it was unreasonable for the agency to revoke a safety standard on grounds that it was no longer viable without examining the viability of each of the alternative means of complying with the standard. The alternative was an integral part of the standard being revoked.[22] The Court has also recognized that consideration of alternatives is explicitly required by some statutes.[23] In the absence of a statutory duty to do so, however, the Court has required an agency to consider an alternative only when the alternative was so inherent in the action the agency took that its failure

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public proceedings involving CDS payback beginning in 1977, including the litigation which resulted in this Court's decision in *Seatrain*. *See* NPRM, 48 Fed. Reg. 4408-31 (Jan. 31, 1983). The court does note that "the Secretary consider[ed] and reject[ed] at least a half-dozen other suggested measures" in the Regulatory Impact Analysis (RIA), App. 13a, but faults her treatment as being founded on "non-statutory," economic criteria. The RIA is a creature of Executive Order No. 12,291, 3 C.F.R. 127 (1981). Its primary purpose is to assess the economic impact of proposed regulations. And while it constitutes a part of the record of the agency action, it is not, in itself, subject to judicial review. *Id.*, § 9.

[22] The Court's action in *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962), was founded on similar grounds. There the ICC had a choice of alternative remedies to a problem causing inadequate trucking service. The Court merely held that it was unreasonable under the circumstances for the ICC to select one option without even considering the others. Once again the alternative was inherent in the action taken.

[23] *E.g.*, *Overton Park*, 401 U.S. 402 (1971) (consideration of alternatives required by section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c), and by the Federal-Aid Highway Act, 23 U.S.C. § 138); *Vermont Yankee* (consideration of alternatives required by the National Environmental Policy Act, 42 U.S.C. §§ 4321-35).

to consider that alternative made the chosen action itself unreasonable.

This approach is the only one that makes sense where, as here, the court's function is to rule on the reasonableness of the agency's action. *Overton Park, supra.* The existence of other reasonable alternatives (no matter how obvious) is irrelevant to the question whether the action taken was reasonable. As the Court noted in *Mourning v. Family Publications Service*, 411 U.S. 356, 371-72 (1973): "That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." [24]

Here again the court below ignores this Court's guidance. The court below holds that the agency must, as a procedural matter, explain its decision to reject alternatives without regard to their relationship to the action actually taken, and without regard to the reasonableness of that action.[25] In the present case, the agency had no statutory duty to consider alternatives, and no alternatives were inherent in the action it actually took.

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[24] *Cf. Ansonia Bd. of Ed. v. Philbrook*, 479 U.S. ——, ——, 107 S.Ct. 367, 377 (1986): Where a "statute directs that any reasonable accommodation . . . is sufficient," once the court determines that the proposed accommodation is reasonable, the "inquiry is at an end."

[25] The court below makes no distinction between actions involving a statute, such as NEPA, which mandates consideration of alternatives, and those not involving such a statute. *Compare Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1301 (D.C. Cir. 1979) (NEPA) *with NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982) (No statutory mandate). Sometimes the court is content if the agency considers "obvious" alternatives. *E.g., Public Citizen v. Steed*, 733 F.2d 93, 99 (D.C. Cir. 1984). Of course, alternatives which seem obscure, or even remote, during the rulemaking process have a way of becoming obvious during judicial review. *Cf. Vermont Yankee*, 435 U.S. at 549-55.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6068

INDEPENDENT U.S. TANKER OWNERS COMMITTEE

v.

ELIZABETH H. DOLE, SECRETARY,
U.S. DEPARTMENT OF TRANSPORTATION, *et al.*

And Consolidated Case Nos. 85-6069, 85-6134, 85-6135, 85-6136, 85-6137, 85-6138, 85-6163

[Filed Mar. 24, 1987]

Before: EDWARDS and BORK, Circuit Judges; SWYGERT*, Senior Circuit Judge, U.S. Court of Appeals for the Seventh Circuit.

PER CURIAM

ORDER

Upon consideration of the petitions for rehearing of American Petrofina, Inc. and Atlantic Richfield Company, it is

ORDERED, by the Court, that the petitions are denied.

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* Sitting by designation pursuant to 28 U.S.C. Section 294(d).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6068

INDEPENDENT U.S. TANKER OWNERS COMMITTEE,
Appellant

v.

ELIZABETH H. DOLE, SECRETARY,
U.S. DEPARTMENT OF TRANSPORTATION, *et al.*

And Consolidated Case Nos. 85-6069, 85-6134, 85-6135, 85-6136, 85-6137, 85-6138 & 85-6163

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 85-01555, 85-01740, 85-01752 and 85-1771)

Argued November 10, 1986

Decided January 16, 1987

Joseph A. Klausner, with whom *Allan A. Tuttle* was on the brief for appellant, Independent U.S. Tanker Owners Committee in Nos. 85-6068 and 86-6134.

Amy Loeserman Klein, with whom *William E. Cohen* and *Marc A. Bernstein* were on the brief for appellants,

First Attransco Tanker Corp., et al. in Nos. 85-6136 and 85-6163.

Daniel P. Levitt, with whom *Richard J. Wertheimer* was on the brief for appellant, Overseas Shipbuilding Group, Inc. in No. 85-6138.

Robert J. Blackwell, *Anne E. Mickey*, *Jeffrey R. Masi* and *Linda L. Martin* were on the brief for appellant, Alaska Bulk Carriers, Inc., et al. in No. 85-6069.

Williams E. McDanels, *Kevin T. Baine* and *Jonathan Blank* were on the brief for appellant, Seatrain Lines, Inc. in Nos. 85-6134, 85-6135, 85-6136 and 85-6137.

Kenneth N. Weinstein, Deputy Assistant General Counsel for Litigation, Department of Transportation, with whom *Richard K. Willard*, Assistant Attorney General, Department of Justice, was on the brief for appellees, Secretary of Transportation, et al. in Nos. 85-6068, et al. *Michael Kimmel* and *Robert S. Greenspan*, Attorneys, Department of Justice, entered appearances for appellees.

Roy C. Bowman and *Richard H. Saltsman* were on the brief for appellee, American Petrofina Inc. in Nos. 85-6068, et al.

Michael Joseph, *Mark P. Schlefer*, *Thomas L. Mills* and *Donald M. Squires* were on the brief for appellees, Atlantic Richfield Co., et al. in Nos. 85-6068, et al.

Before: EDWARDS and BORK, *Circuit Judges*, and SWYGERT, **Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* BORK.

BORK, *Circuit Judge*: These consolidated cases are before us on appeal from a decision of the district court, which sustained the validity of a rule promulgated by the Secretary of Transportation. Appellants challenge the

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* Of the United States Court of Appeals for the Seventh Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

rule as exceeding the Secretary's statutory authority and as arbitrary and capricious agency action; they also raise a battery of specific procedural objections to the manner in which the rule was promulgated. We find that the Secretary was well within her statutory authority in promulgating the rule, but that she failed to provide an adequate account of how the rule serves the objectives set out in the governing statute, the Merchant Marine Act of 1936, ch. 858, 49 Stat. 1985 (codified as amended at 46 U.S.C. §§ 1101-1295g (1982)).

I.

The rulemaking that gives rise to this case is the latest of numerous attempts by the Congress, the Maritime Administration, and the Department of Transportation to address the recurrent problems of the United States merchant marine fleet. The American fleet has had great difficulty competing in foreign commerce. American ships typically have higher construction and operating costs than their foreign competitors, not only because they typically must meet more stringent environmental and safety standards, but also because foreign ships often are subsidized and otherwise assisted by their own governments. Congress confronted these problems in 1936 and authorized the United States government to pay up to half the construction costs of American ships that will operate in foreign commerce. 46 U.S.C. §§ 1151-1152 (1982). In addition, Congress authorized the government to subsidize the operating costs of these ships where necessary to meet foreign competition. *Id.* §§ 1171-1172. Despite these provisions, American ships have continued to fare poorly against their competitors in foreign commerce.

Merchant ships that operate in the domestic shipping market do not receive these government subsidies. They are protected from the rigors of foreign competition, however, by the Jones Act, which requires all cargo

transported between points in the United States to be carried on ships built in the United States, registered in the United States, and owned by American citizens. 46 U.S.C. § 883 (1982).[1] They are also protected from having to compete against any of the ships that have received construction subsidies or operating subsidies from the government, except in a few specific and very limited instances.[2] Since the Trans-Alaska Pipeline opened in 1977, however, the domestic fleet has been unable to satisfy the great new demand for large tankers to carry Alaskan oil to other points in the country. The Maritime Administration has responded to this situation by invoking its statutory authority to allow certain subsidized ships to operate in the domestic market for up to six months in a given year if the ships repay a proportional share of the construction subsidy that they have received. 46 C.F.R. Part 250 (1984). Yet this step has only partly solved the problem.

The rule at issue in this case permitted tanker vessels built with the assistance of a federal construction-differential subsidy, which had been barred from competing in domestic trade on account of that subsidy, to undertake domestic operations if they agreed to repay the unamortized portion of the subsidy plus interest during a period that began on June 6, 1985, and closed

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[1] Congress has also established a loan guarantee program to assist the financing of domestic ships. 46 U.S.C. §§ 1271-1276 (1982).

[2] A subsidized ship is not permitted to operate in domestic commerce except in a few limited circumstances, such as on the first or last leg of an overseas voyage if the owner repays a prorated portion of the original subsidy, or upon the Secretary of Transportation's determination that an exemption is necessary or appropriate to carry out the purposes of the Merchant Marine Act, although the latter exception does not allow a subsidized ship to operate in the domestic trade for more than six months in a given year. 46 U.S.C. § 1156 (1982).

one year later. *See* Construction-Differential Subsidy Repayment; Total Payment Policy, 50 Fed. Reg. 19,170 (1985) (codified at 46 C.F.R. § 276.3 (1985)) (hereafter the "payback rule"). This rule addressed problems in both the foreign and domestic markets by providing an opportunity for ships that are not competitive in foreign commerce to enter the domestic market where the demand for their services has increased, but only by agreeing to relinquish their financial advantage over unsubsidized ships. The Maritime Administration has considered proposals for individual ships to repay their subsidies at least since 1964. In 1977, several owners of unsubsidized ships challenged the Administration's approval of repayment by one vessel in particular. The Supreme Court upheld the government's authority to approve subsidy repayment in exchange for permission to enter the domestic market. *See Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980). Shortly thereafter, the Administration established an interim rule that extended this authorization to undertake domestic shipping, upon repayment of the full subsidy plus interest, to a limited class of large tankers whose owners demonstrated "exceptional circumstances" of dismal prospects in foreign commerce to justify the application of the rule. *See* 45 Fed. Reg. 68,393 (1980). The interim rule was challenged, and this court invalidated it, finding that although the Administration had statutory authority to promulgate the rule, it had acted arbitrarily and capriciously by providing an inadequate discussion of the basis and purpose of the rule. *See Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908, 918-20 (D.C. Cir. 1982). At that point, the Secretary of Transportation proposed the payback rule. This rule is similar to the earlier proposed interim rule except that it covers all tankers and does not require tankers to make any showing of "exceptional circumstances" to qualify for the benefits of subsidy repayment.

II.

Appellants initially question the Secretary's statutory authority to promulgate the payback rule. In *Seatrain*, however, the Supreme Court expressly recognized the government's authority under the Merchant Marine Act to approve the repayment of a ship's construction subsidy in return for the lifting of restrictions on domestic operations by that ship. 444 U.S. at 588. Although in *Seatrain* the subsidy repayments were granted on an individualized basis and on a showing of exigent circumstances that justified the need for the government's action, the Court did not rely on either of these facts. Instead, the Court rested its conclusion on "the Secretary's broad contracting powers and discretion to administer the Act," especially the power to approve measures that "directly further the general goals of the Act." *Id.* In particular, the Court stressed the difference between a permanent release from the foreign-trade-only requirement, which requires a vessel to repay its subsidy before it can enter the domestic market, and a temporary release that might render a subsidized ship "capable of taking advantage of every shift in trade and profitability, skimming the cream and leaving what remains to those less mobile." *Id.* The Court stated that a temporary release would be very problematic, but a permanent release was not, at least insofar as it was conditioned on "full repayment" of the subsidy so as to confer no "windfall." *Id.* at 589 & n.31.

The payback rule satisfies these criteria and thus its promulgation falls within the Secretary's statutory authority under the Merchant Marine Act. *See* 46 U.S.C. §§ 1151-1156 (1982); *see also Independent U.S. Tanker Owners Comm.*, 690 F.2d at 917-18 (finding the earlier interim rule to be in harmony with the statutory mandate of the Merchant Marine Act). Indeed, this rule comes much closer to satisfying the Court's concern about "cream-skimming" in the domestic market by subsidized

ships than did the Maritime Administration's previous response to the problem, undertaken pursuant to specific congressional authorization, which was to allow certain subsidized ships to operate in the domestic market for up to six months in a given year if they agree to repay a proportional share of their subsidy. *See id.* § 1156; 46 C.F.R. Part 250 (1984).[3]

III.

Appellants contend that even if the Secretary acted within her statutory authority in promulgating the payback rule, it should be invalidated because it is the product of agency action that was "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A) (1982). In particular, appellants contend that the Secretary failed to provide a sufficiently reasoned discussion of why this rule was adopted and alternatives were rejected in light of the purposes of the Merchant Marine Act, which are the very purposes Congress intended the Secretary to serve when it gave her "broad" discretion to administer the Act. *See* 46 U.S.C. § 1151 (1982); *Seatrain*, 444 U.S. at 588.

It is unfortunate that, once more, we must agree with this contention. This court vacated the previous interim

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[3] In the Notice of Proposed Rulemaking, the Secretary identified facts that might be sufficient to establish the kind of exceptional circumstances that were touched on in *Seatrain* as justifying subsidy repayment. *See* 444 U.S. at 577. In particular, she noted that American tankers operating in foreign commerce "have not been financially successful," largely because of recent events that have been "financially devastating for the world tanker market." 48 Fed. Reg. 4408 (1983). Yet we do not hold that these exceptional circumstances are a *sine qua non* to the Secretary's statutory authority to adopt this rule, given her "broad contracting powers and discretion to administer the Act." *Seatrain*, 444 U.S. at 588. As long as the rule consists of a permanent release from restrictions upon full repayment of the subsidy plus interest, it is within the Secretary's authority under the Merchant Marine Act.

rule because the government "failed completely to fulfill its obligations" to set out an adequate statement of basis and purpose for the rule. *Independent U.S. Tanker Owners Comm.*, 690 F.2d at 919. Now, four years later, we must vacate a similar rule on similar grounds.

Under the Administrative Procedure Act, when an agency initiates a rulemaking that the governing statute does not require to be undertaken "on the record," the agency is nonetheless bound to comply with the requirements for "notice and comment" rulemaking set out in 5 U.S.C. § 533 (1982). *See, e.g., United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 234-41 (1973). One requirement is that after the agency considers the comments presented by the participating parties, it "shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). This statement need not be an exhaustive, detailed account of every aspect of the rulemaking proceedings; it is not meant to be the more elaborate document, complete with findings of fact and conclusions of law, that is required in an on-the-record rulemaking. *See id.* § 557(c). On the other hand, this court has cautioned against "an overly literal reading of the statutory terms 'concise' and 'general' . . . . [which] must be accommodated to the realities of judicial scrutiny." *Automotive Parts & Accessories Ass'n* v. *Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968). At the least, such a statement should indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did, particularly in light of the statutory objectives that the rule must serve. *See National Wildlife Fed'n* v. *Costle*, 629 F.2d 118, 134 (D.C. Cir. 1980); *Automotive Parts*, 407 F.2d at 338; *see also* S. Doc. No. 248, 79th Cong., 2d Sess. 20 (1946) ("The statement of the 'basis and purpose' of rules issued will vary with the rule, but in any case should be fully explanatory of the complete factual and legal basis as well as the object or objects sought.").

In *Seatrain*, the Supreme Court indicated that Congress gave the government broad power to implement the Merchant Marine Act so that the government could take steps that "directly further the general goals of the Act." 444 U.S. at 588. Those objectives are to foster the development and encourage the maintenance of an American merchant marine, in both foreign and domestic commerce, that is:

> (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair.

46 U.S.C. § 1101 (1982).

The Secretary's statement of basis and purpose fails to give an adequate account of how the payback rule serves these objectives and why alternative measures were rejected in light of them. The Secretary's treatment of these objectives, and of the concerns raised about them in the comment proceedings, is cursory at best. For example, concerns about whether this rule meets the statutory objective of maintaining an American merchant marine "sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce" are met with the statement: "The Department believes that the [rule]

will benefit the U.S. Merchant Marine." 50 Fed. Reg. 19,170, 19,173 (1985). Her discussion continues further, but it hardly improves:

> Although it is true, as many commenters pointed out, that some tankers will be forced out of service by more efficient operators, the industry should be more competitive and efficient in the future, especially since some of the most efficient tankers in the U.S. flag fleet would be fully utilized. . . . Overall, the industry should be left in a healthier, more viable condition.

Id. at 19,173-74. On the more dubious proposition that the fleet will remain able to carry "a substantial portion" of foreign commerce, the Secretary candidly acknowledges that "the final rule merely recognizes the existing condition of the U.S. tanker fleet. There currently exist few foreign trade employment opportunities for those vessels and the prospects for future employment in the foreign trade are far from bright." *Id.* at 19,174. Though this statement strongly suggests the view that this rule will hasten an American retreat from carriage of foreign commerce, the Secretary surprisingly asserts that the fleet will remain "more than adequate to carry an appropriate share of the U.S. foreign oil commerce if such opportunities should arise." *Id.* This remark is hard to fathom. If there is currently little hope for the employment of American vessels in foreign trade, then the payback rule will permit the total size of the American fleet to follow its natural tendency to decrease toward the level required by the domestic market. Under present conditions, therefore, the rule will make it impossible to retain a fleet that can carry all domestic traffic and "a substantial portion" of foreign traffic "at all times," which is explicitly set out as an objective in section (a) of the statute.

The Secretary's response to concerns about the rule's effects on the fleet as a naval auxiliary, to take another

example, is similarly unsatisfying. The Navy warned that the projected loss under this rule of "handy-sized" tankers might have adverse implications for national security. The Secretary brushes aside this comment by stating her belief that "the outlook for these old, small product tankers is poor regardless of whether or not this rule is promulgated because of their age and the decline of the U.S. products trade." *Id.* She also claims that other non-fleet ships could fill in the gap, *id.*, even though this observation may not help to satisfy the statutory objective that the fleet itself should constitute "a naval and military auxiliary in time of war or national emergency." 46 U.S.C. § 1101(b) (1982).

Rather than providing a more extensive discussion of the Merchant Marine Act's objectives, the Secretary chooses to rely on other policies in defending the rule. She identifies some of the "most important" reasons for the rule as being "economic efficiency," "use of underemployed resources," "increased competition," and "deregulation." 50 Fed. Reg. at 19,172. As she later elaborates: "It is the Department's position that the competitive forces of the market, rather than government regulation, should be relied upon, whenever feasible, to allocate transportation capacity and resources in the domestic trade. This rule reflects that position." *Id.* at 19,175. The central thrust of her approach, quite obviously, is to subject the merchant marine fleet to the discipline of the free market. Thus she finds it significant that the rule will leave the industry "in a healthier, more viable condition," *id.* at 19,174, and she finds it permissible that the condition of the fleet should depend on what economic opportunities become available in the world market. *See id.* This policy may well be defensible, yet it is not among the objectives specified in the Act, and if the Secretary has decided that it is implicit in or compatible with the statutory objectives, it would be useful for her to explain this decision somewhat more fully. She has failed to do so. The closest she comes is

the conclusory statement that "it would not be appropriate to let the various program objectives reflected in the Act stand in the way of achieving the Act's broader policy mandates, including that of promoting a more competitive and efficient merchant fleet." *Id.* It may, however, be entirely appropriate for the Act's objectives to stand in the way of the payback rule, and perhaps to favor other alternatives, unless the Secretary can offer a fuller and more persuasive explanation for her view that the "broader policy mandates" of the Act include the promotion of a "more competitive and efficient merchant fleet." [4]

The Secretary's failure to link the policies served by this rule to the objectives set out in the Merchant Marine Act is particularly problematic because she does not explain in the statement of basis and purpose why she rejects proposed alternatives to the payback rule. One can find this explanation in the Regulatory Impact Analysis, Joint Appendix ("J.A.") at 1049, where the Secretary considers and rejects at least a half-dozen other suggested measures. Once again, however, her account focuses on non-statutory criteria that favor this rule, such as lower transportation costs, collateral fiscal benefits, and more "efficient" use of the fleet. J.A. at 1089, 1093. She admits that the rule "has a number of adverse impacts," including "the displacement of about 13 tankers . . . most of which are militarily useful handy-sized tankers, loss of employment opportunities for about 800 seamen, and the possible default on several government loans," *id.* at 1093, problems that impinge on the statutory objectives and that might be avoided under some of the

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[4] It may be, of course, that present conditions in the world shipping market make it impossible for the Secretary to find a way to meet all of the statutory objectives. If this is the problem, she should discuss it frankly and directly when she considers which measures to adopt in light of the objectives explicitly set out in the Act.

alternative measures. *See, e.g., id.* at 1091-92 (describing effects of "full-time permissions" option, "status quo" option, and "eliminate permissions" option).

In exercising her decisionmaking authority, the Secretary is certainly free to consider factors that are not mentioned explicitly in the governing statute, yet she is not free to substitute new goals in place of the statutory objectives without explaining how these actions are consistent with her authority under the statute. Her failure to link these non-statutory criteria with Congress' stated objectives in the Act thus makes it impossible for us to uphold the Secretary's decision to reject other measures and adopt this rule in response to the current problems of the merchant marine fleet. Her reliance on these non-statutory criteria is consistently a key point in her justifications for adopting this rule. In order to defend this action as "reasoned decisionmaking," the Secretary must spell out in more detail how her decision to adopt this rule and reject alternative measures by relying on policies of competition and deregulation can be squared with the statutory objectives that Congress specified as the primary guidelines for administrative action in this area. We take no position on whether these policies can be squared with the Act. But in the absence of any such discussion, this court can only conclude that her action is "arbitrary, capricious, . . . or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A) (1982). *See also Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 412-13, 416 (1971) (choice made by the agency must be "in accordance with law" as it can be understood in light of the statutory indicia).[5]

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[5] The grounds of our decision make it unnecessary to discuss the array of more specific procedural objections that appellants have made to this rulemaking. The district court found each of those objections to be without merit, but we take no position on the correctness of those findings.

IV.

We therefore conclude that the Secretary violated section 553(c) of the Administrative Procedure Act by adopting this rule. In fashioning a remedy for an agency's failure to present an adequate statement of basis and purpose, this court may either remand for specific procedures to cure the deficiency without vacating the rule, *see, e.g., National Nutritional Foods Ass'n* v. *Weinberger*, 512 F.2d 688, 701, 703-04 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975), or it may vacate the rule, thus requiring the agency to initiate another rulemaking proceeding if it would seek to confront the problem anew. *See, e.g., Tabor* v. *Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 710-12 (1977). In this case, we vacate the rule because the Secretary's omissions are quite serious and raise considerable doubt about which of the proposed alternatives would best serve the objectives set out in the Merchant Marine Act. Yet we exercise our power to withhold issuance of our mandate until July 16, 1987, to avoid further disruptions in the domestic market and to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade. *See* Fed. R. App. P. 41(a). As of that date, the present rule will be vacated and conditions returned to the *status quo ante*, before the payback rule took effect, subject of course to any further action that may have been taken in the interim.

So ordered.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1555

INDEPENDENT U.S. TANKER OWNERS COMMITTEE,
Plaintiff,

v.

ELIZABETH H. DOLE, *et al.*,
Defendants.

And Consolidated Civil Action Nos. 85-1740,
85-1752 & 85-1771

Filed October 25, 1985

MEMORANDUM AND ORDER

JACKSON, Judge.

These consolidated cases represent a renewal of the protracted conflict between the Executive Branch official responsible for the administration of the Merchant Marine Act of 1936, 46 U.S.C. app. §§ 1151 *et seq.* (1982 & Supp. I 1983), (the "Act"),[1] and an *ad hoc* guild of

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[1] Administration of the Act was originally entrusted to the Secretary of Commerce, and, within his Department, the Maritime Subsidy Board and the Maritime Administration ("MarAd"). In 1981 both the responsibility and the administering agencies were transferred to the Secretary of Transportation by Pub. L. No. 97-31, 95 Stat. 151 (1981). *See, generally, Independent U.S. Tanker Owners Committee* v. *Lewis*, 690 F.2d 908, 910 n.1 (D.C.

shipowners who fear an infringement of the franchise they presently enjoy under the Act and related legislation.

Plaintiffs are owners and operators of various-sized U.S.-flag tankers built entirely with private capital and now employed in the domestic trade, primarily in the transport of crude oil from the oil fields of the Alaskan North Slope ("ANS") to Panama. Defendant Secretary of Transportation (the "Secretary") has, by rule last published May 7, 1985 (the "payback rule"), purported to enable similar vessels built with government subsidies to be relieved of statutory restrictions on competition with plaintiffs' ships in the same trade by repaying their subsidies within the year.[2] Defendant-intervenors are subsidized-vessel owners/operators who expect to avail themselves of the payback rule. At issue is whether, and, if so, to what extent and in what circumstances, the Secretary may lawfully implement the payback rule. The cases are presently before the Court on cross-motions for summary judgment, and, because they entail only a review of agency action taken pursuant to the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1982) ("APA"), the parties agree that there are no material issues of fact in dispute which could be tried in this forum. *See Camp* v. *Pitts*,

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Cir. 1982). All references to "the Secretary" herein are to the responsible Executive Branch officers at the relevant time, irrespective of the departments in which they served.

[2] Another shipowner, Seatrain Lines, Inc., *see infra*, has recently moved to intervene as a party-plaintiff, alleging that the competition it anticipates for its vessels previously admitted to the domestic trade as hardship cases will be ruinous, and those still outside—all idle—which would like to repay their construction subsidies are unable to do so without further financial aid from the government, which is unlikely to be forthcoming. Those defendants who oppose the motion for leave to intervene do so on standing and timeliness grounds. The motion is granted.

411 U.S. 138 (1973).[3] For the reasons set forth below, the Court concludes that the Secretary acted in accordance with law and within the limits of her discretion, and will, therefore, deny plaintiffs' motions for summary judgment, grant those of defendant and defendant-intervenors, and dismiss the several complaints with prejudice.

I.

The twentieth-century tribulations of the American maritime industry have been well-documented in the history of the legislation which has been enacted for its protection and in the judicial antecedents of this case.[4] In brief and general summary, the U.S. merchant marine has been so beset by circumstances—including, *inter alia*, large subsidies given by other trading nations to their own flag fleets, and the higher wages, safety standards, and costs of operation obtaining aboard its own—that it has been rendered largely uncompetitive with foreign merchantmen at sea. To redress its competitive disadvantages and encourage American shipping abroad, therefore, Congress has for a number of years authorized construction and operating differential subsidies ("CDS" and "ODS," respectively) to be paid by the government for ships to be built in U.S. shipyards which are destined for carriage in foreign commerce under the U.S. flag. 46 U.S.C. app. §§ 1151-61. Only U.S.-flag vessels which have received no construction or operating differential subsidies, however, are eligible to participate in an artificial domestic shipping market from which both foreign car-

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[3] Jurisdiction is predicated upon §§ 701 *et seq.* of the APA, and 28 U.S.C. §§ 1331, 1333, 1337, 1651, 2201-02 (1982). Review is sought pursuant to 706(2)(A) of the APA.

[4] *See, generally, Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 574-75, 584 (1980); *Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908, 911-13 (D.C. Cir. 1982). *See also* Kurtz & Isikoff, *Industry Foundering In an Ocean of Aid*, Washington Post, July 16, 1985, at A1, col. 1.

riers and government-subsidized U.S.-flag ships are excluded by Section 27 of the Merchant Marine Act of 1920 (the "Jones Act"), 46 U.S.C. app. § 883 (1982 & Supp. I 1983), and Section 506 of the Act of 1936, 46 U.S.C. app. § 1156 (1982 & Supp. I 1983). The U.S.-flag fleet is, thus, divided generally into two distinct segments: the so-called "Jones Act fleet," operating exclusively in the protected U.S. domestic trade, safe from all but intramural competition; and the subsidized overseas fleet, permitted, as a matter of policy, to operate only in foreign commerce.[5]

Even with the substantial help of government subsidies, however, U.S.-flag tankers have fared poorly in the international mercantile competition over the course of the last decade. Primarily as a result of market forces beyond the United States'—or any one nation's—control, world shipping rates have fallen below the break-even costs of the subsidized American industry. At the same time, however, not altogether by coincidence, the domestic market has flourished, especially down the West Coast *en route* from the Alaskan oil fields to Panama. As a result, since the late 1970's, substantial pressure has been building to relax the strictures of Section 506 of the Act and admit subsidized tankers to the domestic trade to share the bounty.

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[5] To prevent unfair competition between its subsidized vessels and those constructed and operated entirely with private capital, the U.S. has required that any ship built with CDS funds operate exclusively in foreign trade, with two minor exceptions: CDS vessels may sail in the domestic trade on either the first or last leg of an overseas voyage, and MarAd may consent to the operation of a CDS tanker in the domestic trade for up to six months in any 12-month period whenever it determines that "such transfer is necessary or appropriate to carry out the purposes" of the Act. Proportional repayment of the subsidy is required under either exception. 46 U.S.C. app. § 1156. *See Atlantic Richfield Co.* v. *United States,* Nos. 84-5752, 84-5885 (D.C. Cir. October 11, 1985).

In 1980, the Supreme Court held the Secretary to have authority to release a single financially-distressed CDS vessel permanently from its foreign trade commitment, provided the unamortized portion of its subsidy were repaid with interest. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980). Although the *Seatrain* case involved but one ship in unique circumstances of duress upon which the Supreme Court dwelt at length in its opinion, shortly after the decision MarAd issued what it called an "interim" rule of general applicability which would have permitted certain other vessels to repay their CDS to gain admission to the domestic trade, upon a showing of exceptional circumstances and after a determination that no favorable employment opportunities existed for them in foreign commerce. Then, pursuant to its "interim" rule, MarAd granted an application for repayment of its CDS by a second large tanker.

The "interim" rule was immediately challenged by plaintiff Independent U.S. Tanker Owners Committee ("ITOC") on both procedural and substantive grounds vaticinal of most of those it asserts here.[6] In September, 1982, the court of appeals struck down the "interim" rule for MarAd's failure to accompany it with a statement of basis and purpose, and remanded to the district court with instructions to vacate the "interim" rule and order new rulemaking proceedings. *Independent U.S. Tanker Owners Committee* v. *Lewis*, 690 F.2d 908, 918-20. (D.C. Cir. 1982) (hereinafter cited as "*ITOC*").

On January 31, 1983, therefore, the Department of Transportation published the immediate ancestor of the instant payback rule, which purported to permit the re-

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[6] Unlike the payback rule, however, the "interim" rule contemplated *ad hoc* determinations of each individual application for a CDS repayment, afforded notice and opportunity to comment as to each, and required, as a necessary condition for approval, a showing that "no favorable opportunities exist for viable employment of the vessel in the foreign trade." 46 C.F.R. § 276.3(b) (1984).

payment of its CDS by any vessel without first requiring a demonstration of economic necessity. 48 Fed. Reg. 4408 (1983). While the rulemaking was pending, however, Congress acted, on three separate occasions, to preclude implementation of the proposed rule for finite periods, the last prohibition expiring May 15, 1985.[7] A week earlier, anticipating the removal of the impediment, the Secretary promulgated the instant payback rule, in its present and final form, 50 Fed. Reg. 19,170 (1985) (to be codified at 40 C.F.R. pt. 276) (proposed May 7, 1985), to become effective one month later. The payback rule provides, in substance, that any tanker vessel built with CDS may repay its subsidy, with interest, in return for permission to permanently enter the domestic trade, conditioned only by a requirement that the repayment obligation be satisfied by June 8, 1986.

During the two-year hiatus occasioned by Congress' moratoria on implementation of the rule, plaintiffs, or some of them, petitioned the Secretary to reopen the record to receive comments with respect to "changed circumstances" in the interim. But, although it appears from the record that some additional comments were received informally from other interested parties, plaintiffs' petitions to reopen were formally denied, in conjunction with the promulgation of the rule in final form, on the ground that the reopening of the record was both unnecessary (the Secretary having been already sufficiently apprised of plaintiffs' positions) and would serve only to delay the matter further. The Secretary also stated that

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[7] *See* Department of Transportation Appropriations Act, FY 1984, Pub.L. No. 98-78, 97 Stat. 453; Department of Commerce Appropriations Act, FY 1984, Pub.L. No. 98-166, 97 Stat. 1071; and Department of Commerce, Justice and State Department Appropriations Act, FY 1985, Pub.L. No. 98-411, 98 Stat. 1545.

The Court is informed that on June 12, 1985, the House of Representatives passed a similar prohibition which is now pending before the entire Congress as part of the 1985 supplemental budget proposal.

she was receiving "up-to-date" information from the Department of Energy and other sources, bringing to her attention directly any "changed circumstances."

II.

The Secretary's Authority Under the Act

Notwithstanding the *Seatrain* case, *supra*, plaintiffs say, the Secretary lacks authority under the Act to lift domestic trading restrictions on *all* CDS-built vessels by means of single rule which applies automatically to the entire subsidized tanker fleet without regard to circumstances. The Secretary maintains the issue was determined in her favor by the Supreme Court in *Seatrain*.

It is certainly arguable that *Seatrain* was limited to its facts. The case concerned the approval of the application of a single CDS tanker for admission to the domestic trade, not an entire flotilla, and in upholding the Secretary's authority to allow the application conditioned upon a repayment of its CDS, the Supreme Court remarked upon market conditions, took into consideration the straitened circumstances of the vessel's owner, and then concluded that nothing in the Act suggested that "the Secretary is forbidden to approve transactions *of this sort under these circumstances.*" 444 U.S. at 588 (emphasis added).

On the other hand, it is manifest from the balance of the *Seatrain* opinion that the Supreme Court ruled as it did as a matter of statutory construction, not in review of an exercise of administrative discretion. "The primary question for decision" was, as the Court stated it, "whether the Secretary . . . may terminate the restrictions imposed pursuant to [the Act] when the owners of a vessel constructed with a CDS repay that subsidy in full." *Id.* at 574. It said nothing about the plight of the applicant or the state of the market. And, in reversing a decision of the court of appeals for this circuit which

had found, in the express provision in Section 506 of the Act for *temporary* admissions of CDS vessels to the domestic trade upon specified conditions, an implied prohibition of *permanent* admissions upon any conditions, the Court said:

> The Court of Appeals was of the view that the specific exceptions in § 506 marked the limit of the Secretary's authority to approve entry of subsidized vessels into the domestic trade. By its logic, detail, and legislative history, the panel majority reasoned, that section prohibits transactions like the one before us. In consequence, that court found the broad sweep of the Secretary's power under the balance of the Act irrelevant, the express language giving the Secretary authority to make and amend contracts unimportant, and the policy arguments advanced by the Secretary unpersuasive.
>
> We disagree. On the face of the statute, the Secretary's broad contracting powers and discretion to administer the Act seem to comprehend the authority urged by petitioners here.

Id. at 587-88 (footnote omitted). "In conclusion," it said, "we hold that the Act empowers the Secretary to approve full-repayment/permanent-release transactions of the type at issue here. . . . [W]e express no view upon the merits of the Secretary's particular exercise of discretion with regard to the [vessel involved] since that issue is not before us." *Id.* at 597.

This Court concludes that *Seatrain* did confirm the discretionary authority of the Secretary under the Act to admit CDS-built vessels to the domestic trade, upon repayment of their subsidies, in circumstances otherwise undefined.[8] It must, therefore, consider whether the au-

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[8] The court of appeals subsequently observed of *Seatrain* in *ITOC* v. *Lewis*, *supra*, "The Supreme Court specifically did not address the question . . . of when or how [the Secretary] might

thority can be exercised without regard to individual circumstances at all other than generic market conditions for U.S.-flag tankers and consumers of their services.

Conformity of the Payback Rule With the Act

Plaintiffs take issue with the payback rule itself in multiple respects. Assuming her discretion in the matter, they assert, the Secretary has abused it grievously by promulgating a rule with so drastic and precipitous an impact upon an entire industry that it will confound each of the purposes the Act proclaims for itself.[9] Plaintiffs maintain that the rule would compromise national defense because it would deplete the merchant fleet of the smaller, so-called "handy-tankers" which are most useful for military purposes. They argue that the rule imperils civilian commerce, because it abrogates the two-fleet principle embodied in the Jones Act, invites the *en masse* abandonment of foreign commerce by U.S.-flag vessels altogether,

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exercise this discretion [to allow permanent repayment and entry into the domestic trade] in accordance with the purposes of the Act." 690 F.2d at 913-14 & n.17.

[9] 46 U.S.C. § 1101 provides in pertinent part:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce . . . and to provide shipping service essential for maintaining the flow of such domestic and foreign . . . commerce at all times, (b) capable of serving as a naval and military auxiliary, . . . (c) owned and operated under the United States flag by citizens of the United States, . . . (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

See also, Seatrain, 444 U.S. at 584 & n.25.

and threatens the vitality of the domestic trade fleet by suffusing the market with a vast overtonnage. The decline of the domestic fleet would, in turn, diminish the number of jobs available for American merchant seamen. Moreover, the intensified competition would most severely affect the newer tankers in the ANS fleet, according to plaintiffs, because those ships are, as a rule, both debt-ridden and not fully written off, and must, therefore, operate at higher rates in order to cover costs. The result will be, according to plaintiffs, contrary to the Secretary's expectations, antithetical to the Act's objective of a modern and efficient merchant marine with the "safest" and "best" equipment aboard. Finally, plaintiffs submit that the influx of existing large CDS tankers into the ANS trade will significantly reduce demand for new tankers for the domestic trade, historically the largest consumer of new ship construction, thus idling the shipyards where they might have been built.[10]

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[10] Plaintiff Overseas Shipholding Group, Inc. ("OSG") also argues that the Secretary's rulemaking was inadequate in its failure to include an Environmental Impact Statement ("EIS") or satisfactorily explain its absence, as required by the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1982 & Supp. I 1983) ("NEPA").

NEPA requires that the promulgation of any rule be accompanied by an EIS, 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9 (1985), unless the agency finds that the rule will have "no significant impact" on the quality of the human environment. 40 C.F.R. § 1508.13 (1985). A finding of "no impact," in turn, must be supported by an environmental assessment ("EA"), containing "sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." 40 C.F.R. §§ 1501.4, 1508.9.

The Secretary made such a finding, basing it upon a 65-page EA accompanying the rule, A.R. at 2490-2555, which discussed its potential hazards, the most significant being, of course, oil spills. The Secretary concluded that, some large CDS vessels being already in the trade, the nature of the hazard was merely more of the same rather an hitherto unencountered risk, and that larger vessels

The Secretary's response to each point invokes the same Darwinian principles, but the points are, each and all, touched upon, directly or indirectly, in her commentary accompanying the rule and the administrative record. Confronted with a surfeit of underemployed U.S.-flag vessels generally, she says, and an artificially dislocated market for their services, she has determined to dispense with at least one of the artifices within her control in the hope that disinhibited competition will, over time, distill the best U.S.-flag merchant tanker fleet of which present circumstances will admit, although admittedly less than every one would desire.

Plaintiffs' objections are all, in substance, simply that the Secretary has grossly underestimated the rule's sanguinary consequences, and that its ultimate effect will not be the survival of the fittest but the extinction of the entire species. But having been presented with an agency record which speaks to all the concerns to which plaintiffs give expression, this Court cannot, within the limits of the scope of the review it is permitted to make of the payback rule, find that the Secretary has failed to give consideration to the relevant factors or has made a clear error of judgment in her disposition of them. *See Center for Auto Safety* v. *Peck*, 751 F.2d 1336, 1342 (D.C. Cir. 1985) *quoting Motor Vehicles Manufacturers Ass'n, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

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carrying the same quantity of oil would mean fewer voyages on which spills might occur.

Moreover, it appears that a comprehensive EIS was prepared in May, 1973, in connection with the CDS *payment* program, which explored in detail the environmental hazards attendant upon, *inter alia*, the transport of crude oil by the very ships now expected to *repay* their subsidies. Since the nature of those hazards is unaffected by the character of the vessels as payee or payor, there seems little point in studying the matter again.

The Secretary's Consideration of Post-Comment Data

During the two-plus years the payback rule lay dormant at congressional direction, the domestic shipping market obviously did not. Oil was shipped from ANS, and data was generated with respect thereto, which were not in anyone's contemplation when the payback rule was first published in 1983. Both plaintiffs and the Secretary draw upon the data to make projections and predictions for the future. The Secretary continues to foresee a decline in shipping costs with some, albeit acceptable, attrition of the least efficient vessels from the Jones Act fleet. Plaintiffs say the figures are considerably more lugubrious: they forebode a glut of tanker tonnage relative to anticipated ANS oil production which will so depress the market that the domestic merchant tanker fleet would unlikely survive the carnage.

Relying upon supporting affidavits submitted with their motions, plaintiffs argue that the Secretary has been led into fundamental misjudgments of fact and policy that public comment would have brought to light; [11] specifically, they contend that the estimates of present costs, charter rates and fuel consumption, as well as predictions of future Alaskan crude oil production found in the Regulatory Impact Analysis ("RIA") of May, 1985, accompanying (but not published with) the payback rule (A.R.

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[11] Defendant-intervenors Atlantic Richfield Co., Moore-McCormack Bulk Transport, Inc., and Yeon Shipping Corp. have moved that the affidavits, being *dehors* the administrative record in these cases, be stricken insofar as they attack the merits of the agency action. While it is true that "judicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made," *Environmental Defense Fund, Inc.* v. *Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981), the Court may use such extra-record evidence not to examine the propriety of the decision itself, but merely as an indication of the sufficiency of the record before the Secretary when she made it. *Id.* at 286. They may be similarly useful to the court of appeals, and the motion to strike is denied.

2412-2488), were erroneous and led to grossly overstated estimates of savings that could be expected as a result of the rule. Plaintiffs assert that the Secretary's refusal to reopen the comment period in May, 1985, to allow them to expound upon the changed economic conditions, together with her own reliance on data compiled for her alone after the close of the comment period, violates § 553(c) of the APA. *See International Harvester Co.* v. *Ruckleshaus*, 478 F.2d. 615, 649 (D.C. Cir. 1973); *Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375, 393 & n.67 (D.C. Cir. 1973).

As a general proposition, however, a new round of notice and comment is required only where the data relied upon is entirely new and is critical to the agency's determination. *See Community Nutrition Institute* v. *Block*, 749 F.2d 50, 58 (D.C. Cir. 1984) (distinguishing *Portland Cement, supra*). Where subsequent studies or information gathered after close of the comment period merely expand upon or confirm earlier studies' conclusions, or enhance the reliability of earlier data, failure to provide an opportunity for comments on such information is not fatal to the rule it purports to underlie. *Id.*

The Secretary maintains that the data she considered was neither "entirely new" nor "critical," and that, as the information went merely to a "predictive judgment" on her part, the Court should defer to her expertise in any event. She also points out that plaintiffs had the right, and ample opportunity, to submit their own up-to-date information under Department of Transportation regulations had they desired to do so, *see* 49 C.F.R. § 5.27, and that other comments were, in fact, received and considered.

It is, however, immediately apparent that the payback rule published in May, 1985, is identical with the rule published in January of 1983 (save for the repayment terms and the one-year time limit), and the reasons given for it are essentially the same reasons advanced in 1983,

as illuminated by the comments received. It is, thus, clear that the post-record data, whether right or wrong, did not shape the rule but, as the Secretary suggests, the absence of a rule may have shaped the data.

The rule-making process must end at some point. As the court of appeals stated in *ITOC, supra*, when it last remanded to the agency for a resumption of the rule-making proceedings more than three years ago:

> An agency is not obliged to publish a tentative opinion for comment. Otherwise, an absurd and endless process could [ensue]: notice and comment procedures followed by a tentative opinion followed by comment followed by a new tentative opinion (necessary to take account of and respond to the new set of comments) and so on.

690 F.2d at 926. Moreover, in such rulemaking proceedings generally, it is not only entirely permissible for an agency to consult extra-record information to give meaning to that upon which its decisions are based, but

> [i]nterpretation of, and assignment of weight to, data such as these is a task which particularly calls for expert judgment. In interpreting such data and in making predictions based on them, the [agency] must be expected to make use of the experience it has gained through years of dealing with the problem. . . . Frequently, statistics, scientific reports and studies will be amenable to various interpretations and effective regulation requires that the [agency] bring to bear the full range of its knowledge, garnered from whatever source, in making the interpretation on which it bases important policy decisions.

City of Chicago v. *FPC*, 458 F.2d 731, 747 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972) (footnote omitted). In such cases, the object of judicial review is simply "to determine whether a reasoned conclusion from the record as a whole could support the premise on which

the [agency's] action rests. . . . [I]n all cases, reasoned conclusions are the hallmark of regularity." *Id.* at 744.

III.

This Court must also add to its legal obligation to refrain from substituting its judgment for that of the Secretary, *see Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971), its recognition of the fact that the genesis of this particular rule is at least as much Executive Branch policy of the current Administration as it is the product of routine regulatory activity. The Secretary acknowledges that CDS repayment "is consistent with this Administration's pro-competitive, anti-regulatory philosophy," 50 Fed. Reg. 19,172, and that "[i]t is this Administration's position that competition should be relied upon whenever feasible to allocate our nation's transportation resources." A.R. at 2433. Thus, it is the President's—not merely an agency's—policy which the payback rule will implement, unless Congress or the courts should gainsay him. And, from the days of the *Seatrain* case all three branches of government have been aware that the prospect of commingling subsidized and unsubsidized vessels in the domestic trade raises issues as complex as the consequences of their resolution are profound; such questions, being matters of national policy, are best answered by the political branches, not the judicial.

Finally, the payback rule has most assuredly not evolved in obscurity. Congress has thrice put the rule on hold, then ultimately allowed its prohibition to lapse. While it is settled wisdom not to attribute more significance to legislative inertia than is wont, congressional inaction in response to an agency's public declaration of what it intends to do with what it believes its statutory authority to be, particularly when Congress is aware of the controversy attending it, gives credence to the supposition that Congress either approves, or is at least will-

ing that the agency be allowed to try what it proposes. *See North Haven Board of Education* v. *Bell*, 456 U.S. 512, 533-35 (1982); *CBS, Inc.* v. *Federal Communications Comm'n*, 453 U.S. 367, 382-85 (1981); *Planned Parenthood Fed. of America* v. *Heckler*, 712 F.2d 650, 660 (D.C. Cir. 1983).

The Court concludes that the Secretary's reasoning is clear, whether or not it will prove to have been correct, and that the payback rule rationally follows from that reasoning. It concludes, further, that the rule, its historical origins, and its expected consequences have been sufficiently vexed before the courts, Congress, and the agency for nearly a decade, and that no purpose would be served by a remand for further administrative mastication. What plaintiffs might have told the Secretary about the rule or the post-1983 data in the RIA had she reopened the record as they wished, they have now presented in the context of this proceeding, with no perceptible effect on her thinking. She remains committed to the rule as written, and it is for Congress, if anyone, to require that it be altered.

For the foregoing reasons, therefore, it is, this 25th day of October, 1985,

ORDERED, that plaintiffs' motions for summary judgment are denied; and it is

FURTHER ORDERED, that defendant's and defendant-intervenors' motions for summary judgment are granted; and it is

FURTHER ORDERED, that the complaints are dismissed with prejudice.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX D

[50 Fed. Reg. 19,170-78 (May 7, 1985)]

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Maritime Administration

Docket No. 78

46 CFR Part 276

Construction-Differential Subsidy Repayment; Total Payment Policy

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: This rule amends 46 CFR Part 276 which sets forth the Department's policy in considering requests for repayment of construction-differential subsidy (CDS), as authorized under the provisions of the Merchant Marine Act of 1936, as amended. This rule permits the total repayment of construction differential subsidies (CDS) for U.S. tanker vessels provided that full repayment is received by June 6, 1986. Once CDS is repaid, the vessel may be used without restriction in the domestic trade. The amendments are necessary to facilitate CDS payback approvals and, thereby, encourage the development of an efficient and competitive U.S. flag merchant marine by minimizing government obstacles to the marketplace decisions of vessel operators. The rule applies to all tanker vessels with no restriction as to size.

EFFECTIVE DATE: This rule is effective on June 6, 1985.

* * * *

The Final Rule

Based on a review of the comments and the new data received, the Department has decided to adopt a final rule, which, in most respects, is identical to the proposal in the January 1983 NPRM. Except as discussed in this final rule and the Regulatory Impact Analysis (RIA), which was prepared in conjunction with its development, the basis for the Department's change in its CDS payback policy remains as set forth in the NPRM. The most important reasons are as follows:

• *Economic efficiency.* The economic benefits of CDS repayment derive basically from the efficiency of the vessels that would be entering the Alaskan oil trades, compared to the older, smaller, less efficient vessels that could be forced into retirement. This greater efficiency would be reflected in oil transport cost savings, which, based on the RIA analysis, total as much as $823 million (net present value (NPV)) in the first ten years.

• *Use of underemployed resources.* CDS repayment would provide full-time employment to the most efficient U.S. tankers, including the six VLCCs which are idle when they are not operating in the ANS trade under six-month permissions. (The seventh VLCC has been employed in the carriage of oil to the Strategic Petroleum Reserve under the Cargo Preference Act, but is currently laid-up.)

• *Increased competition.* By opening up the trade, CDS repayment would increase competition and tend to reduce average tanker rates. The Department believes that additional savings to shippers from this increased competition might reach $2.5 billion NPV through the year 1955.

• *Deregulation.* CDS repayment is consistent with this Administration's pro-competitive, anti-regulatory philosophy. It will eliminate government's role in deciding on six-month permission requests which effectively serves as an entry limiting, anti-competitive mechanism.

• *Equity.* By permitting CDS repayment, the Department would no longer arbitrarily limit repayment to the two Seatrain vessels, which were permitted to repay in 1977 and 1980.

The overall effect of CDS repayment will be a stronger, more viable U.S. merchant marine. In addition to the major reasons mentioned above, the Department also considered the following important impacts in developing the final rule:

• *Effect on Federal revenues.* Repayment by the initial seven VLCC's would provide revenues to the Treasury (including interest) of as much as $277 million. Should additional vessels have their CDS repaid, the U.S. Treasury would receive additional revenues. Offsetting government losses of up to $170 million are possible. Additional savings from reduced ODS payments are possible. DOT also estimated that, at one time, there might have been substantial increased windfall profits taxes (because of decreased transportation costs, oil company net prices would have been higher); however, because of the currently low world oil prices, as adjusted for inflation, there will be no immediate increased windfall profits taxes. If world oil prices were to increase, however, this situation could change.

• *Effects on the environment.* The increased use of larger tankers, which would result from CDS repayment, would reduce the number of port calls and decrease the possible frequency of oil spill incidents.

The Department has made one important change to the NPRM proposal in developing this final rule. The NPRM specified no restriction on the amount of time available to pay back CDS. Based on comments and further consideration by the Department, the final rule includes a one-year time limit after the rule's effective date during which total CDS repayment must be accomplished. A one-year time limit was selected since it provides a rea-

sonable period of time to arrange for necessary financing for those who plan to pay back their CDS. That time limit also minimizes the period of uncertainty regarding future competition that will be faced by those operators of tankers not built with CDS. It will also minimize the period of uncertainty in the shipbuilding industry; after the one-year period, shipbuilders may start receiving new tanker orders since the tanker operators will be better able to predict their new construction requirements.

* * * *

The Rule

PART 276—[AMENDED]

1. The authority citation for Part 276 continues to read as follows:

Authority: Secs. 204(b), 207, 506, and 714, Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b), 1117, 1156, and 1204) Pub. L. 86-518 (74 Stat. 216); Reorganization Plans No. 21 of 1960 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840), as amended by Pub. L. 91-469 (84 Stat 1036); and Dept. of Commerce Organization Order 10-8 (36 FR 19707), July 23, 1973), unless otherwise noted.

2. 46 CFR 276.3 is revised to read as follows:

§ 276.3 Total repayment.

(a) In accordance with the terms and conditions of this section and upon receipt of an appropriate application, the Maritime Administration will allow the total repayment of unamortized construction differential subsidy (CDS), with interest, and rescind permanently the domestic trading restrictions related to the grant of CDS for tankers of any deadweight tonnage. Approval of total repayment shall be irreversible. The full repayment amount must be received by June 6, 1986.

(b) *Repayment Terms.* The full repayment amount should consist of the unamortized CDS, as determined by the Maritime Administration, with compounded interest on that amount. The interest rate will be the same as the long-term interest rate the owner obtained, or would have obtained if long-term debt financing had been used, in financing his/her portion of the tanker. Unless the Maritime Administrator determines that using interest rates other than long-term bond rates is justified, such rates will be used. If more than one long-term bond was issued to finance the owner's portion of a specific tanker, or if one or more of such bonds has more than one rate (such as a serial bond) an average interest rate will be computed weighted by the proportion of each bond par value to the total par value of all long-term bonds issued to finance the owner's tanker. The interest payable on the unamortized CDS shall be computed by continuous compounding of the interest until the day of repayment. For purposes of this paragraph, "long-term bond rates" are either actual Title XI bond rates on a specific owner's tanker or the Title XI long-term bond rate at the time the tanker's statutory life began.

Issued in Washington, D.C., on May 3, 1985.

Elizabeth Hanford Dole,

Secretary of Transportation.

APPENDIX E

[48 Fed. Reg. 4408-14 (Jan. 31, 1983)]

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

46 CFR Part 276

Docket No. 78

Construction-Differential Subsidy Repayment;
Total Repayment Policy

AGENCY: Department of Transportation (DOT), Office of the Secretary (OST).

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This notice proposes to amend 46 CFR Part 276 which sets forth the Department's policy in considering requests for repayment of construction-differential subsidy (CDS), as authorized under the provisions of the Merchant Marine Act of 1936, as amended. The proposed amendments are necessary to facilitate CDS payback approvals and, thereby, encourage the development of an efficient and competitive U.S. flag merchant marine by minimizing government obstacles to the marketplace decisions of vessel operators. The rule, as proposed herein, would apply to all tanker vessels. However, comment is also invited on limiting the rule to tankers of at least 100,000 deadweight tons (DWT) or some lower weight.

* * * *

Rationale for this Proposal

The Department believes, for a number of reasons, it is now necessary to promulgate a permanent rule. Basically, the Department's proposal would allow tankers of any size presently operating in the foreign trade and

constructed with CDS funds to enter and operate in the Jones Act trade upon total repayment of the unamortized CDS amount owing. For reasons discussed later, the Department is specifically requesting comments on whether the rule should be limited to larger tankers.

Adoption of this proposal would be consistent with the policies of the Act. It is the policy of the United States to foster the development and encourage the maintenance of the U.S. merchant marine. To effectuate this policy, it is most important that an efficient and competitive domestic merchant marine be encouraged, primarily by allowing it to compete freely in the commercial marketplace. Only in that way can a merchant marine sufficient to meet the objectives of the Act be guaranteed. Accordingly, if they are to succeed, the promotional and regulatory policies of the Federal government should minimize government interference in the marketplace decisions of vessel operators.

Adoption of this proposed rule would also be consistent with the Supreme Court's holding in *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, *supra*. In reaching its decision, the Supreme Court carefully examined the Act and its legislative history. It concluded that a permanent release from domestic trading restrictions granted to CDS vessels is consistent with the purpose of the Act. It also specifically recognized the inherent benefits of a vessel's permanent release over temporary releases authorized by section 506 of the Act. The court stated

> Section 506 . . . permit[s] a vessel that enjoys the benefits of a CDS to operate outside the foreign market only in narrow circumstances, generally upon a highly discretionary administrative decision, and for no more than six months a year. And we have no doubt that it would be flatly inconsistent with the congressional intent were the Secretary or this court to conclude that a temporary release not meeting

> these conditions was proper. But a permanent release upon full repayment is quite different. It irrevocably locates the vessel in the unsubsidized fleet and, thus, poses no danger of a supercompetitor skimming the cream from each market. It creates no long-term instability. And it confers no windfall. On the contrary, at least where repayment of the CDS includes some amount reflecting capital costs which would have been incurred had no subsidy been available, such a transaction merely permits a once subsidized vessel to enter the domestic trade on a footing equal to that of vessels already in that trade. It was not the purpose of the Act to prohibit such entry . . . . Id. at 589-90.

The Supreme Court's analysis confirms that allowing a permanent release of domestic trading restrictions in exchange for full repayment of CDS over the long term is preferable to *de facto* government regulation of capacity in the domestic trade by reason of the issuance of temporary and highly discretionary waivers under section 506 of the Act. The permanent entry of a vessel into these trades allows existing operators to adjust their operations to meet new market conditions. On the other hand, the temporary entry of vessels into the trade under section 506 of the Act subjects the relevant market to the exercise of the Maritime Administration's discretion, thus increasing instability and the inefficient allocation of capacity in the trade.

Further, the denial of an application for permanent release of domestic trading restrictions in exchange for full repayment of CDS may keep a vessel from being employed in a market where it is most efficient. This hardly can be considered to be consistent with the policies of the Act. Nowhere in the Act does it provide that less efficient operators are entitled to protection in the markets in which they operate.

Economically, promulgation of the proposed rule is fully justified. Its benefits outweigh its costs. There are fifteen CDS-built tankers that could be expected to repay their CDS with interest and enter the Alaska North Slope (ANS) trade full-time under the proposal. (ANS oil production was initiated by opening of the Trans-Alaska Pipeline System and has created an increased demand for U.S. flag tankers.) The section 506 waiver process is inadequate to meet the demand.

Included in the fifteen are seven very large crude carriers (VLCC's) of over 1.8 million DWT and eight tankers of approximately 90,000 DWT each. These tankers are among the most efficient U.S. flag tankers. If allowed into the domestic market on a permanent basis, they would add 1.6 million DWT of additional ANS tanker capacity (taking into consideration existing waivers). Removal of regulatory restrictions, in addition to providing for full-time and permanent use of our efficient tankers, would increase ANS oil trade competition and reduce the costs of oil transportation. Additional benefits of the rule could be up to an estimated $200 million in cash, in CDS plus interest, repaid to the U.S. Treasury, and the increased probability of Title XI government loan guarantee repayment for the CDS-built tankers entering the ANS trade.

CDS repayment would not adversely affect the employment opportunities of unsubsidized VLCC's or unsubsidized tankers weighing 90,000 DWT. Unsubsidized tankers in the 100,000 to 130,000 DWT category could be affected, but they are, generally, relatively new tankers with reasonable prospects for ANS employment even with the added competition of CDS-built tankers.

If this proposal is adopted, the major impact of CDS repayment would fall on those tankers weighing 80,000 DWT and under. There are approximately 20 such tankers, all owned or chartered to oil companies in the

ANS trade. These oil companies will be faced with the choice of chartering the CDS built tankers at lower rates and redeploying their less efficient tankers to other trades or simply retaining their tankers in the ANS trade and using CDS-built tankers for the additional demand.

The rate structure of the ANS trade would also be benefitted by adoption of this proposal. Presently, the tanker rates range from $7.25-$16.50/DWT/month for tankers ranging in size from 80,000-170,000 DWT. This rate structure has been significantly affected by *de facto* capacity "regulation" of the ANS trade. Since domestic market entry is restricted, rates are maintained at an artificially higher level than otherwise would be true if the market entry restrictions were removed.

The proposal would also assist in reducing the Title XI exposure. This reduction would occur when a Title XI vessel that is unable to secure full-time employment is put into a market where full-time employment is attainable.

By 1988, there will be 138 unsubsidized tankers, 20 years or older in age, with over 4.7 million DWT of capacity and no Title XI debt. If CDS repayment is permitted, up to 15 large, efficient tankers could be added to the unsubsidized tanker fleet, representing 2.5 million DWT of capacity (0.9 million DWT of the present temporary waiver capacity and 1.6 million DWT of additional capacity) in the ANS trade. These tankers would have much improved ANS full time trading prospects, and the overall Title XI exposure on these vessels would be significantly reduced.

The benefits of this proposal lie, in part, in securing employment for CDS tankers that have been unable to maintain employment in the foreign trade. CDS built VLCC's have garnered the most six month waivers, with 90,000 DWT tankers also obtaining a few waivers. With the additional spectre of significantly fewer opportunities to operate in the Strategic Petroleum Reserve (SPR) fill program, both types of tankers will have even greater

difficulty securing employment in the future unless CDS repayment is allowed. CDS repayment would allow these vessels to seek full-time employment in the ANS trade and in that way maximize the usefulness of the most efficient tankers in the U.S. fleet.

* * * *

Accordingly, it is proposed to amend 46 CFR § 276.3 to read as follows:

§ 276.3 *Total repayment*

(a) In accordance with the terms and conditions of this section and upon receipt of an appropriate application, the Maritime Administration will allow the total repayment of unamortized construction differential subsidy (CDS), with interest, and rescind permanently the domestic trading restrictions related to the grant of CDS for tankers of any deadweight tonnage. Approval of total repayment shall be irreversible.

(b) *Repayment Terms*

The interest rate will be the same as the long-term interest rate the owner obtained, or would have obtained if long-term debt financing had been used, in financing his/her portion of the tanker. Unless the Maritime Administrator determines that using interest rates other than long-term bond rates is justified, such rates will be used. If more than one long term bond was issued to finance the owner's portion of a specific tanker, or if one or more of such bonds has more than one rate (such as a serial bond) an average interest rate will be computed weighted by the proportion of each bond par value to the total par value of all long term bonds issued to finance the owner's tanker. The interest payable on the unamortized CDS shall be computed by continuous compounding of the interest until the day of repayment. For purposes of this paragraph, "long term bond rates" are either actual Title XI bond rates on a specific owner's tanker or the Title

XI long-term bond rate at the time the tanker's statutory life began.

Authority: Sections 204(6), 207, 506, and 714, Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b) 1117, 1156, and 1204 Pub. L. 86-518 (74 Stat. 216).

Issued in Washington, D.C. on Jan. 27, 1983

/s/ Andrew L. Lewis
ANDREW L. LEWIS
Secretary of Transportation

APPENDIX F

SUBSIDIARIES AND AFFILIATES OF PETITIONER ATLANTIC RICHFIELD COMPANY

Agro Internacional, S. de R. L. de C.V.
Alyeska Pipeline Service Company
Anamex Mining Company
Arco Solar Nigeria Ltd.
A/S Skaland Grafitverk
Badger Pipe Line Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Colonial Pipeline Company
Compania de Petroleo Ganso Azul, Ltda.
Compania Minera dos Republicas, S.A. de C.V.
Cook Inlet Pipe Line Company
Dixie Pipeline Company
East Texas Salt Water Disposal Company
85819 Canada Limited
Eisenhower Mining Company
Industria Nacobre, S.A. de C.V.
Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Logan Aluminum Inc.
Nihon Oxirane Company, Ltd.
Nordisk Mineselskab A/S
P. T. Elnusa Chemlink
Platte Pipe Line Company
Prince Consolidated Mining Company
Rodman, Inc.
Sinclair Venezuelan Oil Company
Smokehouse Copper Mining Company
Sumiarco Company Limited
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

Supreme Court, U.S.
FILED
JUL 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred when it required the Department of Transportation to provide more than a conclusory explanation of the legal basis for a rule that on its face conflicts with the enabling statute.

RULE 28.1 LISTING

Respondent Sun Transport, Inc. is a wholly owned subsidiary of Sun Company, Inc., a publicly traded corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1829

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The respondents Alaska Bulk Carriers, Inc., Cove Maritime Companies, Inc., Crest Tankers, Inc., Falcon Carriers, Inc., Sun Transport, Inc., Trinidad Corporation and Victory Carriers, Inc., respectfully pray that a writ of certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in *Independent U.S. Tanker Owners Committee v. Dole* on January 16, 1987.

REASONS FOR DENYING THE WRIT

The court's ruling below falls well within the established precepts of the Administrative Procedure Act ("APA"). Furthermore, because of the interlocutory nature of the proceeding below, for this Court to review the decision could be a pointless exercise. The court below stayed the issuance of its mandate to enable the agency

to reassess the construction-differential subsidy ("CDS") payback issue, which the agency has now done.[1] In a final rule issued June 22, 1987 and made immediately effective, the agency has reassessed the CDS payback rule and decided to allow the three CDS-VLCCs at issue to remain permanently in the domestic trade. Thus, no CDS ships have been removed from the domestic trade because of the court's ruling. If any CDS ships are ultimately returned to the foreign trade, it will be because of a deficiency in the Maritime Administration's new CDS-repayment rule. That rule is not before the Court. The inappropriateness of review is further indicated by

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[1] On March 11, 1987, the Maritime Administration stated in the *Federal Register:*

> "MARAD hereby announces the action it intends to take. MARAD has decided to address the issue of CDS repayment through rulemaking. The tentative schedule for proceeding with such rulemaking is as follows:
>
> (1) MARAD plans to publish in the Federal Register a Notice of Proposed Rulemaking (NPRM) on CDS repayment. MARAD intends to request comments on that NPRM. A draft regulatory evaluation and an environmental assessment will be made available to the public at that time.
>
> (2) MARAD plans to publish a Final Rule in the Federal Register prior to July 16, 1987. MARAD intends to address the comments received on the NPRM in the Final Rule. A final regulatory evaluation and environmental assessment will be made available to the public at that time." 52 *Fed. Reg.* 7462 col 1 (1987).

Marad published the NPRM on April 15, 1987, 52 *Fed.* Reg. 12199 col 3 (1987), proposing that the three ships at issue in this Petition be permitted to remain in the domestic trade and calling for comments by May 15, 1987. Petitioner, Respondents and others submitted comments.

On June 22, 1987, Marad published a final rule, effective immediately, allowing the three CDS VLCCs at issue below and the CDS-built BAY RIDGE to remain permanently in the domestic trade. 52 *Fed. Reg.* 23522 (1987). A suit was filed challenging the new rule. *Independent U.S. Tankers Owners Committee v. Dole,* No. 87-1685 (D.D.C. filed June 19, 1987).

the decision of the government not to join with Petitioner in seeking rehearing below and not to support Petitioner's petition.[2]

The APA requires the agency to "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1982). A principal function of this statement is to enable judicial review, that is to reveal to the reviewing court what the agency considered, how it responded to comments, and how the agency chose to exercise its authority under the enabling statute.[3] It is not enough to recite conclusions.[4] An adequate statement is a predicate to the deference due agencies by the reviewing court under the APA.[5]

Judge Bork's decision below, representing the unanimous opinion of a philosophically diverse panel, is emi-

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[2] Sup. Ct. R. 19.6.

[3] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 49-50 (1983) ("*Motor Vehicle*") ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner [citations omitted] and we reaffirm this principle again today."); S. Doc. 248, 79th Cong., 2d Sess. 20 (1946) ("The statement of the 'basis and purpose' of rules issued will vary with the rule, but in any case should be fully explanatory of the complete factual and legal basis as well as the real object or objects sought.")

[4] *Motor Vehicle*, 463 U.S. at 53.

[5] *Cf., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) ("Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government can become a monster which rules with no practical limits on its discretion.' [citation omitted]."); *Bowen v. American Hospital Ass'n*, 476 U.S. ——, 106 S. Ct. 2101, 2113 (1986) ("Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both.")

nently in line with these settled APA principles. The court did indeed discern that the agency was pursuing a deregulatory policy which the agency said in conclusory terms would serve the purposes of the Merchant Marine Act of 1936, as amended (the "Merchant Marine Act"). But, the court could not allow the agency's unexplained belief to substitute for reasoned consideration.[6] Judge Bork noted several apparent and important inconsistencies between the explicit Congressional purposes and directions underlying the Merchant Marine Act[7] and the projected effect of the rule.[8] It is not remarkable that these unexplained and serious inconsistencies failed to pass muster.

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[6] *Cf. Motor Vehicle*, 463 U.S. at 60 (Rehnquist, J., concurring in part and dissenting in part):

> "As long as the agency remains within the bounds established by Congress,* it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.
>
> ---
>
> * Of course, a new administration may not choose not to enforce laws of which it does not approve, or *to ignore statutory standards in carrying out its regulatory functions . . .*" (emphasis added).

[7] Section 101, Merchant Marine Act, 46 U.S.C. § 1101 (1982).

[8] The court found that the agency's treatment of the explicit statutory objectives, "and of the concerns raised about them in the comment proceedings, is cursory at best." *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987) (*"ITOC"*), Petition for Writ of Certiorari at 10a. The court noted "for example" the inconsistencies between the projected effect of the rule and the statutory objectives of maintaining a fleet to serve domestic and foreign commerce and to serve as a naval auxiliary. *ITOC*, 809 F.2d at 852-53, Petition for Writ of Certiorari at 11a-12a. The court described the Secretary's failure to explain as "quite serious". *ITOC*, 809 F.2d at 855, Petition for Writ of Certiorari at 15a.

Far from going beyond the requirements of the APA, the court upheld the integrity of the APA.[9] It would have been derelict of the court not to have held the agency to its minimum duty—to explain how the rule serves the enabling statute. There is nothing for the Supreme Court to correct here.

Petitioner faults the court below for not going far enough, for not evaluating whether the rule could possibly be consistent with the Merchant Marine Act. It is well settled, however, that it is not the court's function to fill the gaps left by the agency.[10] It is a corollary of the notion of agency primacy, indeed of the constitutional role of the faithfully administering executive, that the agency and not the court provide the rationale upon which policy must be based.

Petitioner suggests that the decision below and the court's 1982 vacation of an earlier CDS payback rule,[11] are instances of an activist court substituting its judgment for that of the agency's and thereby frustrating the agency's policy initiative.[12] To the contrary, the two decisions represent a court trying to preserve the agency's chosen policy initiative, while at the same time honoring the minimum required by the APA. No CDS repaid ship has yet been put out of the domestic trade

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[9] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) ("This is not to deprecate but to vindicate [citation omitted] the administrative process . . .")

[10] *Motor Vehicle*, 463 U.S. at 51; *Bowen v. American Hospital Ass'n*, 476 U.S. ——, 106 S. Ct. 2101, 2112-2113 (1986).

[11] *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982) ("*ITOC v. Lewis*").

[12] Petitioner relies heavily on *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), suggesting that the court below invaded the province of the agency, when in fact the court only insisted that the agency do its job. The court did not impose on the agency any new procedures or dictate alternatives. Cf. *Motor Vehicle*, 463 U.S. at 51-52.

by either decision. In *ITOC v. Lewis*, the BAY RIDGE remained in the trade (and does to this day) while the agency reconsidered the issue on an as yet uncompleted 1982 remand. In the decision below, the court stayed the effectiveness of its mandate for six months, again leaving the CDS repaid ships in the trade while the agency attempts to correct itself. The only functional difference between the decisions is that the court below acted to prevent a lingering remand. The decision below is, therefore, a balancing of the agency's initiative against the Respondents' rights. It is a judicious administrative law decision.

Beyond the fact that there is nothing here calling for the Court's intervention, the Court's review could be of little or no practical effect. If, as Petitioner requests, the Court were to reverse the decision below and hold that the court should have decided whether the rule can be squared with the Act, the effect of that reversal would be to undo the vacation of the old rule. The agency has now made a new policy decision on a new record, however. The agency has made final its proposal to leave the CDS repaid ships in the domestic trade. That decision is based on a new explanation, and judicial review by the lower courts has commenced. The Petitioner will have the substantive judicial review that it asks for here. If, on the other hand, the Court were to affirm the decision of the court below, the fate of the three CDS ships at issue would still be determined by the new rulemaking. Thus, this Court's intervention is not necessary.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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July 15, 1987

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JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1829

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ATLANTIC RICHFIELD COMPANY,
Petitioner,
v.
INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Respondents.

BRIEF OF SEATRAIN LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in requiring the Secretary of Transportation to explain how her abrupt reversal of a long-standing maritime policy was consistent with the United States maritime laws.

RULE 28.1 LISTING

The following are parents, subsidiaries (except wholly-owned subsidiaries) or affiliates of respondent Seatrain Lines, Inc.: Tenafly Holdings, Inc.; Richmond Tankers, Inc.; Queensway Tankers, Inc.; Bay Tankers, Inc.; East River Steamship Corp.; and Kingsway Tankers, Inc.

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IN THE

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OCTOBER TERM, 1987

No. 86-1829

ATLANTIC RICHFIELD COMPANY,
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BRIEF OF SEATRAIN LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT OF THE CASE

This brief is submitted in opposition to the Petition for a Writ of Certiorari submitted by Atlantic Richfield Company ("ARCO"), an intervening defendant in this case. Neither the Secretary of Transportation, the original defendent, nor American Petrofina, Inc., the other intervening defendant, has filed such a petition.

Background

The statutory framework governing the United States merchant fleet divides that fleet into two segments: (1) the so-called "Jones Act" fleet, consisting of American-built, unsubsidized vessels operating in the U.S. domestic trade; and (2) the subsidized fleet,

consisting of vessels built with construction differential subsidies ("CDS") and run with operating differential subsidies, which are generally restricted to the foreign trade. *See* 46 U.S.C. § 883 (1982); 46 U.S.C. § 1156 (1982). In 1980, this Court held that the Secretary of Commerce had the authority to permit a subsidized vessel owner to repay the unamortized portion of its CDS and thereafter enter the domestic trade on a permanent basis. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980).[1] While upholding the Secretary's authority to permit CDS repayment in an appropriate case, however, the Court did not undertake to define the circumstances under which CDS repayment should be allowed.[2]

Until the promulgation of the CDS payback rule at issue in this case, CDS repayment had been approved only "in very special circumstances." H.R. Rep. No. 92-688, at 10 (1971), quoted in *Seatrain Shipbuilding Corp.*, 444 U.S. at 596. After this

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[1] The Secretary of Commerce's authority over the merchant marine was transferred to the Secretary of Transportation in 1981. 95 Stat. 151. This Brief uses the word "Secretary" to refer to the responsible official at the relevant time.

[2] Indeed, the Court explicitly stated that it "express[ed] no view upon the merits of the Secretary's particular exercise of discretion" in permitting CDS repayment in that case by Seatrain's vessel, the STUYVESANT. 444 U.S. at 597. The STUYVESANT was permitted to repay CDS upon findings that it was a financially distressed vessel without opportunities in the foreign trade, that failure to allow repayment would jeopardize the continued operation of Seatrain and the financial interest of the government as guarantor of Seatrain's obligations, and that repayment would not have any significant adverse competitive effect upon vessels in the domestic trade. *Id.* at 577; T.T. STUYVESANT, Docket No. A-124 (U.S. Maritime Administration, Jan. 6, 1978).

Court's decision in the *Seatrain* case, the Maritime Subsidy Board ("MSB") proposed a general rule that would have permitted CDS repayment only upon a showing of four specific "exceptional circumstances"—(1) the absence of favorable opportunities in the foreign trade for a protracted period; (2) consequent inability of the owner to make required principal and interest payments on debt guaranteed by the government, and imminent bankruptcy of such party; (3) consequent financial loss to the government; and (4) likely absence of any significant adverse competitive effect on other vessels already operating in the domestic trade. 45 Fed. Reg. 29610, 29611 (1980). In later promulgating an interim rule, the MSB declared that it would require a showing of "exceptional circumstances," but "exceptional circumstances" were defined more loosely than in the proposed rule. Instead of requiring all four findings required in the proposed rule, the interim rule required the first finding and declared that other enumerated factors would be "consider[ed]" in determining whether "exceptional circumstances" exist. 45 Fed. Reg. 68393, 68394 (1980).

Operators of vessels in the domestic fleet complained that the interim rule was not sufficiently restrictive of CDS repayment, and in *Independent U.S. Tanker Owners Committee ("ITOC")* v. *Lewis*, 690 F.2d 908 (D.C. Cir. 1982), the court of appeals invalidated the interim rule. While the court found no substantive fault with the rule's discretionary and flexible "exceptional circumstances" standard, it held that the MSB had failed to provide an adequate statement of its reasons for rejecting the more rigid rule that had been proposed. *Id.* at 918-20.

Although the problem identified by the court of appeals was the MSB's failure to explain why it had rejected a more rigid rule limiting CDS repayment, the Secretary's response on remand was to go to the opposite extreme. She proposed and adopted a blanket repayment rule that abandoned the long-standing policy of limiting CDS repayment to exceptional cases, and permitted all CDS tankers to repay their CDS and enter the domestic trade within a one year period ending on June 6, 1986. Notice of Proposed Rulemaking, 48 Fed. Reg. 4408 (1983); Final Rule, 50 Fed. Reg. 19170 (1985), codified at 46 C.F.R. § 276.3 (1986). Three vessels repaid their CDS pursuant to this blanket rule. Two are owned by the petitioner, ARCO, and one is owned by American Petrofina, Inc., also a party to this case.

The Decision Below

The new CDS repayment rule was immediately challenged by U.S. shipowners (including Seatrain Lines, Inc.) who were concerned, among other things, that blanket CDS repayment would have an adverse competitive impact on the existing domestic fleet. The U.S. Court of Appeals for the D.C. Circuit agreed with plaintiffs that the rule should be invalidated for two related reasons: (1) the Secretary had failed to explain how the policy considerations upon which she had relied were consistent with the express goals of the Merchant Marine Act, 1936, 46 U.S.C. § 1101 *et seq.* (1982); and (2) she had failed to explain why a number of regulatory alternatives that might better have served the goals of the Act had been rejected. Appendix to the Petition for a Writ of Certiorari ("Pet. App.") 10a-15a.

When the blanket repayment rule was promulgated, the Secretary of Transportation explained that it was based upon her desire to promote "economic efficiency," "increased competition," and "deregulation." Pet. App. 12a. Circuit Judge Bork, writing for the court of appeals, noted:

> The central thrust of her approach, quite obviously, is to subject the Merchant Marine fleet to the discipline of the free market. . . . This policy may well be defensible, yet it is not among the objectives specified in the Act . . . .

Pet. App. 12a.

The court of appeals expressly noted that it took "no position on whether these policies [of competition and deregulation] can be squared with the Act." Pet. App. at 14a. But the court was troubled by the Secretary's reliance upon such "non-statutory criteria," and unwilling to accept without further explanation the conclusion that a rule based upon those criteria promoted the goals of the Act. The court observed:

> In exercising her decisionmaking authority, the Secretary is certainly free to consider factors that are not mentioned explicitly in the governing statute, yet she is not free to substitute new goals in place of the statutory objectives without explaining how these actions are consistent with her authority under the statute. Her failure to link these non-statutory criteria with Congress' stated objectives in the Act thus makes it impossible for us to uphold the Secretary's decision to reject other measures and adopt this rule in response to the current problems of the merchant marine fleet. Her reliance on these non-statutory criteria is consistently a

> key point in her justifications for adopting this rule. In order to defend this action as "reasoned decisionmaking," the Secretary must spell out in more detail how her decision to adopt this rule and reject alternative measures by relying on policies of competition and deregulation can be squared with the statutory objectives that Congress specified as the primary guidelines for administrative action in this area.

Pet. App. 14a.

To give the Secretary an opportunity to justify, revise, or withdraw the rule at her discretion, the court of appeals stayed its mandate for six months, stating that the ultimate result would depend on the Secretary's actions in the interim. Pet. App. 15a.

Subsequent Developments

On June 22, 1987, the Maritime Administration ("MarAd") adopted a revised rule, under which the three vessels that took advantage of the blanket repayment rule would remain in the domestic trade.[3] On April 23, 1987, prior to MarAd's adoption of the revised rule, the House of Representatives passed a measure expressly prohibiting the use of any appropriated funds "to propose, promulgate, or implement any rule or regulation . . . with respect to the repay-

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[3] 52 Fed. Reg. 12199 (1987). The revised rule, like the 1985 blanket rule, would also authorize the continued operation of a fourth vessel, Seatrain's BAY RIDGE, in the domestic trade. The BAY RIDGE was admitted to the trade pursuant to the 1980 interim rule, which was invalidated in *ITOC* v. *Lewis*, 690 F.2d 908 (D.C. Cir. 1982). The BAY RIDGE was allowed to continue operating in the domestic trade pending the completion of proceedings on remand. *Id.* at 931.

ment of construction differential subsidy," or to conduct any other proceeding with regard to the three vessels that repaid their CDS pursuant to the rule invalidated by the court of appeals. This provision was approved by the full Congress after adoption of the revised rule, and was signed into law by the President on July 11.[4]

Petitions have been filed with MarAd seeking reconsideration of the revised rule on the ground, among others, that Congress has prohibited its implementation. Litigation has also been commenced challenging the revised rule.

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[4] Section 505 of the Supplemental Appropriations Bill, 1987, Pub. L. 100-71, provides as follows:

> None of the funds appropriated or made available by this or any other Act or otherwise appropriated or made available to the Secretary of Transportation or the Maritime Administrator for purposes of administering the Merchant Marine Act, 1936, as amended (46 U.S.C. § 1101 et seq.) shall be used by the United States Department of Transportation or the United States Maritime Administration to propose, promulgate, or implement any rule or regulation, or, with regard to vessels which repaid subsidy pursuant to the rule promulgated by the Secretary May 3, 1985 and vacated by Order of the U.S. Court of Appeals for the D.C. Circuit January 16, 1987, conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construction differential subsidy for the permanent release of vessels from the restrictions in section 506 of the Merchant Marine Act, 1936, as amended: *Provided,* That such funds may be used to the extent such expenditure relates to a rule which conforms to statutory standards hereafter enacted by Congress.

REASONS FOR DENYING THE WRIT

The court of appeals based its decision upon firmly established principles of administrative law, which do not warrant review by this Court. As this Court has emphasized, "an agency must cogently explain why it has exercised its discretion in a given manner," [5] and "[i]n reviewing that explanation, [a court] must 'consider whether the decision was based on a consideration of the relevant factors.' " *Motor Vehicles Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 48, 43, (1983) (hereinafter "*State Farm*"), quoting *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).[6] The court of appeals held simply that the Secretary's explanation for her action did not demonstrate that it was based upon the relevant factors identified in the applicable statute, the Merchant Marine Act, 1936. As the court noted: "The Secretary's statement of basis and purpose fails to give an adequate account of how the payback rule serves these [explicit statutory] objectives . . . ." Pet. App. 10a.[7]

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[5] In the context of informal rulemaking, this principle has an explicit statutory foundation—the requirement that agencies "shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 533(c) (1982).

[6] *See also Bowen* v. *American Hospital Association*, —— U.S. ——, 106 S. Ct. 2101, 2112-13 (1986) and cases cited therein; *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

[7] These objectives are enumerated in 46 U.S.C. § 1101. They include the development of a merchant marine that is (1) sufficient to carry a substantial portion of U.S. domestic and foreign commerce at all times; (2) capable of serving as

The thrust of ARCO's petition is that the court of appeals has imposed a novel and burdensome requirement, by insisting that the Secretary explain how the payback rule serves the objectives of the Merchant Marine Act, 1936. But that requirement can hardly be characterized as novel or burdensome. There is no more basic principle of administrative law than the requirement that an agency explain how its action conforms to its statutory mandate.[8] Indeed, ARCO itself quotes the fundamental principle at issue in this case: an agency's "record of its action [must be] such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed." Petition ("Pet.") 9, quoting *Opp Cotton Mills, Inc.* v. *Administrator of Wage and Hour Division*, 312 U.S. 126, 144 (1941).

In this case, the court of appeals found itself unable to determine whether the Secretary's action "conformed to the standards which Congress has prescribed." *Ibid.* The Secretary, the court explained, gave only "cursory" attention to those standards, Pet. App. 10a, and relied instead upon "non-statutory criteria" without explaining how those criteria "can be squared with the statutory objectives that

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an emergency naval auxiliary; (3) composed of the best-equipped, safest, and most suitable vessels; and (4) supplemented by efficient facilities for shipbuilding and repair.

[8] *See, e.g., Bowen* v. *American Hospital Ass'n*, 106 S.Ct. at 2112-13; *State Farm*, 463 U.S. at 43; *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806-08 (1973).

Congress specified as the primary guidelines for administrative action in this area." Pet. App. 14a.[9] The absence of such an explanation was not a mere technical deficiency. "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . ." *State Farm*, 463 U.S. at 43. It necessarily follows that reliance on "non-statutory criteria" must be accompanied by an explanation of their consistency with the Congressional mandate.[10]

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[9] ARCO does not base its Petition on the argument that the criteria relied upon by the Secretary are in fact consistent with the objectives of the Act. The court of appeals took "no position" on that question, and left it open for the parties and the Secretary to consider on remand. The Petition is based instead on the contention that the Secretary need not explain how her action was consistent with the Act.

[10] Contrary to ARCO's suggestion, there is no inconsistency between the D.C. Circuit's criteria for assessing an agency's statement of basis and purpose and those identified by other circuits. Indeed, the very cases cited by ARCO show that other circuits apply the "arbitrary and capricious" standard using the same fundamental criterion applied in this case: has the agency provided a contemporaneous analysis of how its action comports with the statutory factors? *See South Carolina ex rel. Tindal* v. *Block*, 717 F.2d 874, 882-85 (4th Cir. 1983), *cert. denied*, 465 U.S. 1080 (1984) (Secretary of Agriculture did consider statutory factors); *id.* at 886 (Secretary set forth how proposed rule will serve those factors in statement of basis and purpose); *United States* v. *Garner*, 767 F.2d 104, 115-23 (5th Cir. 1985) (regulation held arbitrary and capricious where agency failed to set forth contemporaneous statement of basis and purpose); *id.* at 116 (*citing State Farm*, 463 U.S. at 43, and numerous recent D.C. Circuit cases); *Sierra Club* v. *Clark*, 755 F.2d 608, 612-19 (8th Cir. 1985) (remanding to district court to assess whether agency statement of basis and purpose was arbitrary and capricious for not addressing statutory factors).

ARCO also argues that the court of appeals has imposed a new requirement that an agency explain why alternative measures were rejected. But the court of appeals did not hold, as ARCO states, that an agency must always "explain why the rule [it adopts] was not rejected in favor of other rules that might have been proposed." Pet. 7. The court simply concluded that the "Secretary's failure to link the policies served by this rule to the objectives set out in the Merchant Marine Act is particularly problematic because she does not explain . . . why she rejects proposed alternatives to the payback rule." Pet. App. 13a. In other words, the absence of an explanation why alternatives were rejected was not an independent ground for the court of appeals' decision. It compounded the problem that was created by the Secretary's failure to link the rule to the objectives of the Act in the first place.

The inadequacy of the Secretary's explanation for her action in this case was striking, given the abrupt change of course upon which she was embarking. As noted above, CDS repayment had historically been limited to cases in which "exceptional circumstances" could be shown to justify repayment. See pp. 2-3, *supra*. And a critical factor in determining whether repayment by a particular vessel would be allowed was whether the demand for additional tanker tonnage in the domestic fleet was sufficient to accomodate the vessel without an adverse impact upon vessels already in the trade. See *ITOC* v. *Lewis*, 690 F.2d at 914-15; 45 Fed. Reg. 68393, 68394 (1980) (interim rule). In adopting the rule at issue in this case, the Secretary abandoned the requirement of "exceptional circumstances," and substituted a blanket rule that permitted CDS repayment by any ves-

sel regardless of the impact on the existing domestic fleet.[11]

This Court has emphasized that an agency has a "duty to explain its departure from prior norms." *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 808 (1973). *See also Bowen* v. *American Hospital Association*, —— U.S. ——, 106 S.Ct. 2101, 2122 n.34 (1986); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411-12 n.11 (1979), *citing General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143 (1976). The "presumption from which judicial review should start . . . is . . . *against* changes in current policy that are not justified by the rulemaking record." *State Farm*, 463 U.S. at 42 (emphasis in original). "An agency's view of what is in the public interest may change . . . . But an agency changing its course must supply a reasoned analysis." *Id.* at 57. That is all the court of appeals required.[12]

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[11] As the Secretary acknowledged, the economic analysis supporting the blanket repayment rule

> "differ[ed] significantly from previous economic analyses prepared by MarAd concerned with CDS repayment. Instead of assessing the prospects for a mathematical balance of demand and supply of . . . tanker capacity, this analysis focuses on the economic impact of tankers likely to be scrapped if CDS repayment is allowed . . . ."

Notice of Proposed Rulemaking, 48 Fed. Reg. 4408, 4427 (1983).

[12] Petitioner here, like those in *State Farm*, "invoke[s] [this Court's] decision in *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council, Inc.*, 435 U.S. 519 (1978) as though it were a talisman under which any agency decision is by definition unimpeachable." *State Farm*, 463 U.S. at 50. In fact, the court of appeals' decision, like

In sum, the court of appeals' decision was consistent with the most fundamental principles of administrative law. It presents no conflict with decisions of this Court or other courts of appeals, and does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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that of this Court in *State Farm*, avoids imposing specific procedures on the agency, while requiring a "reasoned analysis" for a change in policy. *See State Farm*, 463 U.S. at 50-51, 57.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT OVERSEAS SHIPHOLDING GROUP, INC.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to review the decision below which did nothing more than require the rulemaker adequately to explain the Rule's apparent departure from a long-established statutory scheme.

2. Whether certiorari should be granted to review so unexceptional a judicial decision, where reversal would not resolve the controversy but simply require the court below to pass upon substantial procedural and environmental challenges which have been left undecided.

3. Whether certiorari should be granted, at the behest of a private party, to review a decision sustaining one challenge to the 1985 Rule, where the rulemaker herself chose not to seek review here but to lay aside the 1985 Rule and propose a new 1987 Rule which would permit petitioner's vessels to remain in the protected coastal trades—if the new Rule survives challenge.

4. Whether certiorari should be granted where, as here, legislation has been enacted and signed into law prohibiting use of appropriated funds to promulgate, implement, enforce or even defend both the Rule at issue and its 1987 successor.

RULE 28.1 LISTING

Respondent Overseas Shipholding Corporation is a public company whose non-wholly owned subsidiaries or affiliates are:

Anglomar Shipping Co. Ltd.
Conti-OSG Associates (I through IV)
First United Shipping Corp.
Interocean Tanker Corp.
Moran Maritime Associates
Reliance Shipping B.V.
Second United Shipping Corp.
Spirit Shipping B.V.
Third United Shipping Corp.

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RESPONDENT OVERSEAS SHIPHOLDING GROUP, INC.'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Overseas Shipholding Group, Inc. ("OSG") respectively requests that this Court deny the petition seeking review of the decision of the Court of Appeals for the District of Columbia, entered in *Independent U.S. Tanker Owners Committee v. Dole* on January 16, 1987.

OSG is the largest independent operator of unsubsidized tankers in the Nation's Jones Act fleet. Through subsidiaries, it operates nine unsubsidized tankers in the protected Alaskan trade, on charter to one or another of the three major Alaska

North Slope crude oil producers which together make up the entire trade.

The Background

OSG invested approximately $400 million of its own funds in its Jones Act fleet. When most of these investments were made, it had the option of accepting subsidies for their construction and operation and then serving the Nation's foreign commerce. Instead, after taking into account the number of tankers that were under, or scheduled for, unsubsidized construction, it chose to build without government subsidy and operate its tankers in the protected coastal trades. The Nation's maritime laws have long distinguished between foreign and domestic commerce, and provide that only United States flag vessels built in this country without subsidy, flying the United States flag, and employing United States crews may engage in the coastal trades. This is the so-called "Jones Act fleet."

The price for making the contrary decision—to accept handsome construction and operating subsidies—was exclusion from the coastal trades, including the Alaska trade. This statutory scheme was intended to provide incentives for operators to serve both foreign and domestic commerce. Subsidies were designed to enable United States flag vessels to carry an appropriate share of the Nation's foreign commerce, in competition with foreign vessels. Protection against foreign and subsidized United States vessels was intended to encourage construction and operation of unsubsidized United States flag vessels sufficient to carry the domestic trade.

In the event of temporary situations of undercapacity in the coastal trades, Section 506 of the Merchant Marine Act of 1936, 46 U.S.C. Section 1156, authorized the Secretary to grant *temporary* exemptions permitting individual subsidized tankers, upon repayment of a pro rata share of their subsidies, to participate in the protected trade—but only for nonconsecutive six-month periods. Such exemptions could generally only be granted to vessels of over 100,000 deadweight tons

("DWT"), and then only when all Jones Act vessels of that size were fully employed. In the past decade, some 40 such exemptions have been granted by the Secretary after administrative determinations that market conditions justified them.

On two occasions only, in situations of special hardship, administrators have also approved "permanent" entry into the Alaska trade by a particular vessel. In one case, this Court approved such a permanent exemption for the STUYVESANT. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980). In the second case, involving the STUYVESANT's sister ship the BAY RIDGE, the Court of Appeals vacated and remanded the permanent exemption on the ground that in adopting an "interim rule" to deal with applications for permanent exemption, the Secretary had failed to discuss or respond to comments received during the rulemaking process, and had failed to take the necessary "hard look." *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 919 (D.C. Cir. 1982).

The 1985 Rule

Rather than address the problems identified by the appellate court in 1982, the Secretary attempted to blur the statutory distinction between foreign and domestic commerce and to avoid the legislatively required determination of market conditions with respect to each exemption application. She proposed by Rule that any of the 29 subsidized tankers could, willy nilly, permanently enter the heretofore protected coastal trades—including the Alaska trade—simply by electing to repay subsidy. That "CDS payback" rule, first proposed in 1983 but delayed for two years by temporary legislative prohibitions, was promulgated as a final Rule on May 8, 1985, to become effective after June 6, 1985.

The Proceedings Below

Before the 1985 Rule became final, OSG and other interested parties sought judicial review on the grounds, among others, that the proposed Rule and the Secretary's written explanations conflicted with applicable statutory mandates, that in promulgating the Rule the Secretary had repeated the same procedural errors that had led the appellate court to vacate the BAY RIDGE exemption, and that she had erred in failing to prepare and circulate to interested agencies and parties the required environmental impact statement.

Although the district court denied both temporary and preliminary injunctive relief, it cautioned the operators of subsidized carriers that if they chose to repay subsidy and enter the protected coastal trades before this controversy was finally resolved, they did so at their peril. Several operators, including petitioner Arco, nevertheless elected to repay.

On January 16, 1987, a unanimous Court of Appeals, in an opinion by Judge Robert Bork, vacated the proposed Rule, on the ground that the Secretary had failed to explain how the Rule squared with the statutory purposes set out in the Merchant Marine Act which separates the Nation's foreign and domestic commerce, and—except for temporary exemptions made on the basis of particularized market need—excludes subsidized vessels from the protected coastal trades. In light of this decision, the Court found it unnecessary to reach the other issues raised by those who challenged the Rule—including the Secretary's violation of the Administrative Procedure Act and the Federal laws protecting the environment.

The Secretary's 1987 Rule

The Secretary elected to respond to the Court's decision not by seeking review here, but by proposing a modified Rule that would permit the three vessels that had elected to repay subsidy under the vacated 1985 Rule (the ARCO INDEPENDENCE, the ARCO SPIRIT and the BROOKLYN), as well as the BAY RIDGE, to remain permanently in the coastal trades. The new proposed Rule was promulgated at 46 C.F.R. Part 276, on

April 15, 1987. Interested parties were invited to submit comments by May 15, 1987. Respondent OSG did submit its own comments on May 15, and joined in the comments filed that day by the Independent U.S. Tanker Owners Committee of which it is a member. The new 1987 Rule was first published in the Federal Register on June 22, 1987, and purported to become effective the same day.

On July 11, 1987, the President signed into law the Supplemental Appropriations Act for fiscal 1987, Section 505 of which prohibits use of appropriated funds to implement, enforce or even defend the 1985 and 1987 Rules.

WHY A WRIT OF CERTIORARI SHOULD BE DENIED

Arco's petition should be denied. *First*, Arco misrepresents the basis for the decision of the Court of Appeals. Rather than pioneer, all the Court did was observe that the Secretary had failed adequately to explain how her proposed departure from the statutory vessel-by-vessel exemption system squared with what appeared to be legislative mandates pointing in a contrary direction, and remand for an explanation or some other response. *Second*, since the Court of Appeals did not reach any of the other substantial grounds upon which the proposed Rule had been challenged, the Secretary has elected to promulgate a somewhat different Rule pertaining to four tankers only, and the Supplemental Appropriations Act of 1987 prohibits enforcement of the 1985 and 1987 Rules, the decision below is academic and not ripe for review.

A. Arco misrepresents what the Court of Appeals decided.

In an effort to create an issue worthy of certiorari, particularly in the unsatisfactory procedural posture of this case, Arco has attempted to paint the decision below as marking a radical departure in administrative law. That position neither fairly characterizes Judge Bork's decision, nor does justice to the cavalier nature of the Rule and its administrative rationalization.

Judge Bork simply recalled the objectives explicitly outlined by Congress in Section 1101 of the Merchant Marine Act—which include fostering development and maintenance of an American merchant marine "sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce," "capable of serving as a naval and military auxiliary in time of war and national emergency," etc. At pages 10a-14a, he pointed out that the Secretary's written statement in support of the Rule either ignored these objectives or brushed them aside—even in the face of written comments from the military objecting to the consequences of the proposed Rule.

It marks no departure in administrative law to require rulemakers to obey statutory commands, and when challenged for appearing to contradict those commands, to explain the proposed rule in a satisfactory way. The Administrative Procedure Act so requires. 5 U.S.C. Section 706(2)(A) (1982). And so do this Court's decisions. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412-13, 416 (1971).

This result was particularly appropriate where Congress had, in the 1970 legislation creating the subsidy program, expressly noted that unregulated competition and the dictates of the market would deprive the Nation's merchant marine of any role in foreign commerce—a result contemplated with equanimity by the Secretary, but forbidden by Congress. S. Rep. No. 1080, 91st Congress, 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4188, 4190.

The result below was also especially appropriate where counsel for the Secretary, in the district court, argued that the rule-maker should not be held to the actual arguments and determinations reflected in the written comments accompanying the Rule, but that the legality of the Rule ought to be measured simply on the basis of whether it was "rational." (Tr. at 56-59, Joint Appendix at 355-358) Down that road lies chaos.

B. The procedural posture of this case supports denial of the writ.

First, as previously noted, the Court of Appeals decided only that the Secretary had not explained how the 1985 Rule squared with the governing statutes, with which it seemed to be inconsistent. The Court did not reach the other substantial grounds upon which the Rule was challenged—namely, that the Secretary had failed to comply with the Administrative Procedure Act and had failed to prepare the required environmental impact statement. Should this Court for some reason review the decision below and reverse, the Court of Appeals must still pass upon these alternative challenges. So decision here would not resolve the controversy.

Second, events have overtaken the decision sought to be reviewed. In response to the Court of Appeals' decision, the Secretary, rather than seek review here, proposed a new CDS payback Rule limited to the four vessels which elected to repay subsidy under the former Rules invalidated by the court below, and promulgated a final Rule to that effect on June 22, 1987. As a result, all subsidized vessels—including Arco's—which chose to repay subsidy are now functioning in the Alaska trade pursuant to the new Rule. Validation now of the old 1985 Rule, even if the Secretary were to change her mind and return to it, would have no practical effect. The 1987 Rule is itself being challenged by respondent OSG and others in the District Court for the District of Columbia—and its validity will have to be determined on the basis of the new 1987 record and the explanatory materials made public by the Secretary.

Third, on July 11, 1987, the Supplemental Appropriations Act for fiscal 1987 became law. Section 505 thereof forbids use of funds appropriated under this or any other law for enforcement, implementation or even defense of both the 1985 and 1987 CDS repayment Rules. That statute either suspends these Rules of its own force, or manifests a congressional understanding that the 1985 and 1987 Rules do not comply with the underlying maritime statutes—as the court below concluded. Section 505 states:

"None of the funds appropriated or made available by this or any other Act or otherwise appropriated or made available to the Secretary of Transportation or the Maritime Administrator for purposes of administering the Merchant Marine Act, 1936 . . . shall be used by the United States Department of Transportation or the United States Maritime Administration to propose, promulgate, or implement any rule or regulation, or, with regard to vessels which repaid subsidy pursuant to the rule promulgated by the Secretary May 3, 1985 and vacated by Order of the U.S. Court of Appeals for the D.C. Circuit January 16, 1987, conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construction differential subsidy for the permanent release of vessels from the restrictions in section 506 . . . *Provided*, That such funds may be used to the extent such expendidture relates to a rule which conforms to statutory standards hereafter enacted by Congress."

In light of this legislation, a grant of certiorari would effectively lead nowhere, even were this Court to reverse.

CONCLUSION

Because the decision of the Court of Appeals does nothing more than require the rulemaker to obey the law and be seen to do so, and because of the unusual administrative and legislative posture of this case, the petition for a writ of certiorari should be denied.

Dated: New York, New York
July 15, 1987

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No. 86-1829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT INDEPENDENT U.S. TANKER OWNERS COMMITTEE IN OPPOSITION

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QUESTION PRESENTED

Whether the court below exceeded the permissible scope of review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982), in vacating a rulemaking on the ground that the Secretary failed to explain "how her decision to adopt this rule and reject alternative measures by relying on policies of competition and deregulation can be squared with the statutory objectives that Congress specified as the primary guidelines for administrative action in this area." 809 F.2d at 854, Pet. App., p. 14a.

LIST OF PARTIES

The parties appearing in the proceeding below are set forth in page (ii) of the Petition.*

* Rule 28.1 Statement. Respondent Independent U.S. Tanker Owners Committee is an unincorporated association representing various corporations engaged in U.S. flag tanker operations.

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BRIEF FOR RESPONDENT INDEPENDENT U.S. TANKER OWNERS COMMITTEE IN OPPOSITION

Respondent Independent U.S. Tanker Owners Committee ("ITOC") submits this brief in opposition to the petition of Atlantic Richfield Company ("Arco") for a writ of certiorari.[1]

OPINIONS BELOW

The opinion and order of the court of appeals is reported at 809 F.2d 847 and is reprinted in the Appendix to the Petition, at p. 2a. The memorandum deci-

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[1] In the court below and in the District Court this action was styled Independent U.S. Tanker Owners Committee v. Elizabeth H. Dole, Secretary, U.S. Department of Transportation, *et al.* In those proceedings Arco was, respectively, an appellee and a defendant-intervenor. In this Court Arco is the petitioner. The Secretary of Transportation and the Department of Transportation have not sought review in this Court.

sion and order of the United States District Court for the District of Columbia (Jackson, D.J.) is reported at 620 F. Supp. 1289 and is reprinted in the Appendix to the Petition, at p. 16a.

JURISDICTION

The court of appeals entered its judgment on January 16, 1987. It denied timely petitions for rehearing on March 24, 1987. Pet. App. 1a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Two sections of the Administrative Procedure Act are involved in the petition. 5 U.S.C. § 553(c) (1982) provides in relevant part:

> After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. § 706(2)(A) (1982) provides in relevant part:

> The reviewing Court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions, found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Also involved is the Merchant Marine Act, 1936, as amended, 46 U.S.C. §§ 1101 ff., and particularly its statement of purpose, Section 101, 46 U.S.C. §§ 1101.

STATEMENT OF THE CASE

Owners of vessels built with construction-differential subsidy under Title V, Merchant Marine Act, 1936, §§ 501 ff., 46 U.S.C. §§ 1151 ff. ("Act"), are required by Section 506, § 1156, to operate exclusively in the foreign trade of the United States. In May 1985, the Secretary of Transportation adopted a rule allowing all owners of subsidized tankers to enter the domestic trade upon repaying the subsidy with interest. 50 Fed. Reg. 19170 (May 7, 1985). On review, the court of appeals held that although the Secretary has statutory power to adopt such a rule, her specific findings respecting its conse-

quences in the actual circumstances raised serious question of its consistency with the statute, especially since her reasons for adopting the rule were on their face not mentioned as among the statutory objectives and she had failed to explain how they advanced or were consistent with such objectives. 809 F.2d at 852-54; Pet. App., pp. 10a-14a. The court was unwilling to say that no such explanation could be found and accordingly vacated the rule, withholding its mandate for a period of six months in order to allow further proceedings. 809 F.2d at 854-55; Pet. App. pp. 14a-15a.

On April 15, 1987, the Department of Transportation, acting through the Maritime Administration, published a notice of proposed rulemaking to adopt a rule to allow four tanker vessels that had repaid their construction differential subsidies to remain in the domestic trade. 52 Fed. Reg. 12199 (April 15, 1987). Three of these vessels had repaid the subsidy pursuant to the May 1985 rule; the fourth had repaid pursuant to an earlier rule which had been earlier vacated. *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982). On April 24, 1987, the House of Representatives passed the Supplemental Appropriations Bill for Fiscal Year 1987 which included a provision prohibiting the Department or the Maritime Administration from expending funds to propose, promulgate or implement any rule relating to the repayment of construction-differential subsidies except insofar as such an expenditure relates to a rule which confirms to statutory standards thereafter enacted by Congress. On June 22, 1987, the Department published a final rule allowing the four vessels to remain in the domestic trade. 52 Fed. Reg. 23522 (June 22, 1987). On July 1, 1987, Congress passed the Supplemental Appropriations Bill for Fiscal Year 1987 which included the prohibition on the Department's or Maritime Administration's expenditure of funds in connection with the repayment of subsidies. On July 11, 1987, the President signed the Supplemental Appropriations Act into law.

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied because the petition does not present a substantial question of federal law.

1. Petitioner complains that the court below should have decided for itself whether the reasons advanced by the agency for its rule were inconsistent with the statute. But it has long been the responsibility of administrative agencies, not only to conform their actions to the requirements of governing statutes, but also to demonstrate such conformance. Thus, in *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197 (1941), affirming the vacation of an NLRB reinstatement order, the Court said, "All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it." In *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (*"Chenery I"*), the Court vacated an SEC remedial order because the agency failed to demonstrate the conformity of its order with governing law:

> It is not for us to determine independently what is "detrimental to the public interest or the interest of investors or consumers" or "fair and equitable" within the meaning of §§ 7 and 11 of the Public Utilities Holding Company Act of 1935. The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding.[2]

In a later decision in the same matter the Court emphasized the "simple but fundamental rule of administrative law" of *Chenery I*:

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[2] Petitioner's argument here that the requirement of a reasoned analysis is a "procedural" requirement was considered and rejected in *Chenery I* (318 U.S. at 95): "We are not enforcing formal requirements."

> That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 196 (1947) (*"Chenery II"*).

Chenery I and *II* established the deep-seated principle that the agency's action must be upheld, if at all, on the basis of its own reasoning, and, if that reasoning is inadequate, the court may not substitute its own. Thus, in the recent decision *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), the Court cited, as its primary example of "an arbitrary and capricious" agency rule, one in which "the agency has relied on factors which Congress has not intended it to consider." That is the precise charge made against the Secretary's rule here. In *State Farm* the Court continued, citing *Chenery II*, "The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.*

2. The "considerable doubt" that the court below expressed concerning the rule's conformity with "the objectives set out in the Merchant Marine Act" (809 F.2d at 855; Pet. App., p. 15a) can best be judged by the facts of this case.

In the interest of national defense and commerce, § 101 of the Act, 46 U.S.C. § 1101, in terms prescribes a merchant marine that is to be (1) privately owned, (2) sufficient to carry all our domestic commerce, (3) sufficient to carry a substantial part of our foreign commerce. (4) suitable for defense service in war, (5) made up of the best equipped, safest and most suitable types, (6) con-

structed in the United States and supported by efficient building and repair facilities, and (7) manned by trained citizen seamen.

In her statement of basis and purpose, which effectively incorporated a regulatory impact analysis ("RIA") (J.A. 1049)[3] as a more detailed explanation of her action, the Secretary made the following findings as to the rule's consequences:

(1) It would displace the full-time equivalent of 13 handy-size tankers that the Department of Defense and Department of the Navy in officially opposing the rule said would amount actually to 20 or 24 militarily useful ships important for national defense.[4]

(2) It would cause the loss of jobs for 800 seamen.[5]

(3) It would on its face allow total abandonment of the foreign tanker trade.[6]

(4) It would definitively preclude further tanker building.

On the other hand, the Secretary found that if she did not adopt the rule, "The benefit of this option is that it would not result in defaults on Jones Act tankers or any adverse impacts on 'handy-sized' tankers, maritime labor,

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[3] "J.A." refers to the Joint Appendix in the court of appeals.

[4] The Secretary advised the Department of Defense to use foreign ships in case of emergency. 50 F.R. 19174 Col. 2.

[5] The Secretary said that the cost of their unemployment compensation would, after all, amount to only 0.3% of the fall in freight rates she expected would result from the rule over 10 years. RIA 34-36; J.A. 1085-87.

[6] The court of appeals observed that this would tend to reduce the fleet to the size of domestic demand alone, contrary to the statutory purpose of maintaining shipping sufficient to carry not only all our domestic commerce but also a substantial part of our foreign commerce. The Secretary argued that although ships transferred to domestic trade would no longer be subsidized, they would still be "available" for foreign trade; but how they could compete without subsidy she did not explain. 50 F.R. 19174 Col. 1.

or existing tanker owners. Demand for new crude tankers [might] bring work to U.S. shipyards and could possibly materialize later this decade, but this is speculative." RIA 40; J.A. 1091.

That is, the Secretary found that her rule would have ascertained negative effects for all the explicit purposes of the Act, and that failure to adopt it would avoid these negative effects.

Why then did she adopt it? She recited a series of anticipated benefits [7] summarized by the court of appeals as "economic efficiency," "use of underemployed resources," "increased competition" and "deregulation," 809 F.2d at 853; Pet. App., p. 33a, which she said would result in an industry "more competitive and efficient in the future," and particularly in very large "savings" to shippers over a period of 10 years. 50 F.R. 19172 Cols. 2, 3; *id.* 19173 Col. 3; *id.* 19175 Col. 3. The savings were to result from entry of the subsidized fleet, which would introduce such acute competition that she predicted freight rates would fall to the level of break-even for the most efficient tonnage, break-even being defined as operating costs plus debt service. RIA 21 (J.A. 1072) and notes 6, 7; 50 F.R. 19175 Col. 3. If the most efficient ships would earn no profits for 10 years, how would fare the rest of the industry?

We agree with petitioner that the court of appeals might well have stricken down the rule—and we urged it to do so—on the straightforward ground that a purpose to bring about such consequences is plainly incompatible with the statutory duty of the Secretary to promote and develop the national merchant marine in the highest interests of state. But petitioner is in no position to complain because the Court gave so much deference

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[7] These benefits included greater tax revenues for the United States and for the State of Alaska and recovery of subsidy funds previously laid out for ship construction. 50 F.R. 19172 Col. 3; *id.* 19177 Col. 1.

to the Secretary as to leave open the possibility that upon further consideration she might be able to show, as she clearly had not done here, that her action is somehow reconcilable with the purposes and policy of the Merchant Marine Act.

3. Petitioner also complains that the court of appeals should not have required the Secretary to explain why she did not adopt possible alternative courses of action. The Court here merely followed the Secretary herself, who explored no fewer than 13 different "options," and gave reasons for rejecting the others that were again unrelated to the apparent purposes and policy of the Merchant Marine Act. RIA 38-42. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., supra*, at 51.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER TERM, 1987

ATLANTIC RICHFIELD COMPANY, PETITIONER

v.

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

Petitioner contends that the court of appeals erred in vacating a rule promulgated by the Secretary of Transportation under the Merchant Marine Act, 46 U.S.C. 1101 *et seq.*, on the ground that the rule lacked "a concise general statement of [its] basis and purpose," as required by the Administrative Procedure Act (APA), 5 U.S.C. 553(c). We share petitioner's reservations about the correctness of the court of appeals' decision. We do not believe, however, that plenary review by this Court is warranted. The Department of Transportation's Maritime Ad-

ministration has recently promulgated a new rule in response to the court of appeals' decision. See 52 Fed. Reg. 23522, 23536 (1987) (to be codified at 46 C.F.R. 276.3). As a result, the importance of the former rule is now diminished, and petitioner's challenge to it, at least as a practical matter, is now moot.

1. This case concerns the validity of a "payback rule" promulgated by the Secretary of Transportation in 1985. That rule allowed certain tanker vessels to engage in domestic commerce upon their repayment, with interest, of the federal subsidies that they had previously received to promote their participation in foreign commerce. See 50 Fed. Reg. 19178 (1985) (codified at 46 C.F.R. 276.3 (1986)). Under the Merchant Marine Act, which authorizes the federal government to subsidize the construction and operating costs of American ships that will operate in foreign commerce (see 46 U.S.C. 1151-1152, 1171-1172), a subsidized ship is not permitted to operate in domestic commerce except in limited circumstances (see 46 U.S.C. 1156). In *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980), this Court upheld the Department of Transportation's authority under the Merchant Marine Act to lift this restriction on domestic shipping in exchange for repayment of the federal subsidy.

In 1980, the Maritime Administration promulgated a rule authorizing permanent lifting of domestic trade restrictions for certain tanker vessels that repaid their subsidies with interest. See 45 Fed. Reg. 68393, 68394 (1980). Several competing domestic tanker owners, including several of the respondents in this case, challenged the 1980 rule, and the court of appeals set it aside. According to the court of appeals, the 1980 rule did not include an adequate statement of its basis and

purpose, as required by the APA, 5 U.S.C. 553(c). See *Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908 (D.C. Cir. 1982).

In January 1983, the Secretary of Transportation published a new notice of proposed rulemaking with a view to permitting all subsidized U.S. tanker vessels to enter the domestic trade permanently upon repayment of the unamortized subsidy plus compound interest from the date of its receipt. 48 Fed. Reg. 4408. The notice reviewed the entire history of subsidy repayment and the comments received on earlier Maritime Administration rulemakings concerning this question. It invited further comment on these issues and assessed the economic impact of allowing the owners/operators of these vessels to determine whether to repay their subsidies. Finally, the proposed rule relied on this Court's conclusion in *Seatrain* (444 U.S. at 589-590) that permanent release of domestic trading restrictions upon full repayment of subsidies would put the once subsidized vessels on a "footing equal to that of vessels already in that trade," and therefore would be superior to the routine practice of allowing those subsidized vessels to participate under temporary releases. See 48 Fed. Reg. 4409 (1983).

In May 1985, the Secretary promulgated a final payback rule, which is the subject of this litigation. The 1985 final rule, like the 1983 proposed rule, permanently lifted domestic trade restrictions for any tanker vessel built with a federal construction subsidy upon repayment of the unamortized subsidy plus compound interest from the date of its receipt, provided that repayment occurred during a one-year period ending on June 6, 1986. See 50 Fed. Reg. 19170, 19173, 19178 (codified at 46 C.F.R. 276.3 (1986)).

The district court sustained the 1985 rule (Pet. App. 16a-31a), but the court of appeals again reversed (*id.* at 2a-15a). Although it rejected respondents' argument that the Secretary lacked statutory authority to promulgate the rule, the court of appeals set aside the 1985 rule on the same ground that it had set aside the 1980 rule, viz., the absence of an adequate statement of basis and purpose, as required by the APA. While concluding that the 1985 rule should be vacated (Pet. App. 15a), the court did not effectuate that result immediately. Instead, it withheld issuance of its mandate until July 16, 1987, "to avoid further disruptions in the domestic market and to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade" (*ibid.*).

On April 15, 1987, the Maritime Administration proposed a revised rule in response to the court of appeals' decision. See 52 Fed. Reg. 12199 (1987). On June 22, 1987, the Maritime Administration published a final new rule, which supersedes the 1985 rule. 52 Fed Reg. 23522, 23536 (1987). The 1987 rule includes a still more comprehensive statement of its basis and purpose, which addresses the issues identified by the court of appeals, and it permanently lifts domestic trade restrictions for those tanker vessels (four in number) that had repaid their federal subsidies pursuant to the now-rescinded 1980 and 1985 rules.

2. We share petitioner's view that the Secretary's 1985 rule adequately explained its basis and purpose, and that the court of appeals' decision to the contrary rests on an unduly expansive application of the APA. As this Court stated in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) (citation omitted) "[a]dministrative decisions should be set

aside * * * only for substantial procedural or substantive reasons as mandated by statute * * *." Consistently with the APA's requirements, the 1985 rule "cogently explain[ed]" the Secretary's action (see *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 48 (1983)) and fully considered and rejected all reasonable alternatives, including the actions taken in prior rulemakings on this subject (see *Vermont Yankee*, 435 U.S. at 551).

We do not believe, however, that review by this Court is warranted at this time. Since the petition in this case was filed, the Maritime Administration has promulgated in final form a new payback rule that replaces the 1985 rule. The promulgation of this new rule obviously diminishes the importance of the 1985 rule and renders moot, at least as a practical matter, the legal challenge that is the subject of this petition. In these circumstances, review by this Court of the validity of the 1985 rule is not warranted.*

Respectfully submitted.

CHARLES FRIED
Solicitor General

JULY 1987

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* The focus of any future litigation should be on the validity of the 1987 rule, and that litigation must be brought in federal district court in the first instance. Of course, if the court of appeals were to set aside the 1987 rule, certiorari might then be warranted. We note that the Independent U.S. Tanker Owners Committee, one of the respondents here, has already filed a complaint in federal district court challenging the validity of the 1987 rule. See *Independent U.S. Tanker Owners Comm.* v. *Dole*, No. 87-1685 (D.D.C. (filed June 19, 1987)).

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ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. SUBSEQUENT EVENTS HAVE NOT DIMINISHED THE NEED FOR REVIEW.

While the federal respondents share petitioner's view that the lower court's decision rests on an unduly expansive application of section 4(b) of the APA (Mem. 4), they believe that the Maritime Administration's adoption of its third CDS payback rule has rendered moot the lower court's decision vacating the second payback rule. Other respondents correctly observe that litigation challenging the new rule has already been commenced (Sea-

train Br. 7)[1] and suggest that a spending prohibition in the Supplemental Appropriations Act for fiscal 1987 has invalidated the rule (Overseas Shipholding Br. 7).[2] The federal respondents' optimism that their new rule will survive yet another examination by the lower court is gratifying, but hardly adequate basis for concluding that the case is moot, even "as a practical matter" (Mem. 4).

The similarity between the present case and *Vermont Yankee*, 435 U.S. 519, extends even to the present procedural posture. In *Vermont Yankee*, as here, the agency had promulgated a new rule to replace the one vacated by the court of appeals. There, as here, the Solicitor General thought that this Court's review was not yet warranted. But also here, as there, the case gives rise to "questions of such significance in this area of the law as to warrant granting certiorari and deciding the case." 435 U.S. at 535-536 n. 14.

II. THE PRIVATE RESPONDENTS MISSTATE THE LOWER COURT'S HOLDING.

The private respondents contend variously that the court of appeals merely held that the agency failed to explain why it exercised its discretion as it did (Seatrain Br. 8), that it ignored and brushed aside certain statutory objectives (Overseas Shipholding Br. 6), that it failed to explain how its payback rule served the Merchant Marine Act (Alaska Bulk Br. 5), or that the court could not itself substitute its own reasoning for the agency's (Independent Tanker Br. 5). None of them, however, disputes petitioner's description of the agency's reasoning (Pet. 3-4) or denies that the court of appeals

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[1] Independent U.S. Tanker Owners Committee v. Dole, Civil Action No. 87-1685 (D. D.C.). One of the complaints advances twelve different reasons for the court to overturn the rule.

[2] See also, H.R. 2763, 100th Cong., 1st Sess., proposing spending prohibitions with respect to future CDS payback in the 1988 appropriations bill.

acknowledged that it understood that reasoning (Pet. 12a-13a) or that the same court had previously recognized the consistency of that reasoning with the underlying statute (Pet. 5).

Whether the lower court's interpretation of the APA is novel or of long standing, its holding was that even when the reviewing court understands why the agency took the action under review, the requirement for "a concise general statement of . . . basis and purpose" will mandate reversal of the action if the agency fails also to explain how its reasons are consistent with the statute.[3] The question presented is whether the APA allows reviewing courts thus to substitute a requirement for legal analysis by the agency for the court's own responsibility to decide whether the agency's action is lawful.

Respectfully submitted,

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[3] One brief in opposition argues that the decision below must reflect "settled APA principles" because it was the unanimous opinion of a "philosophically diverse panel" (Alaska Bulk Br. 3-4). Assuming the accuracy of the characterization of the panel, it might also demonstrate the extent to which its expansive view of the APA pervades the court.